Supreme Court, U.S.
FILED

991817 MAY 15 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

MCI TELECOMMUNICATIONS CORPORATION and MCI INTERNATIONAL, INC.,

Petitioners,

v.

ACCESS TELECOM, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JUDITH R. BLAKEWAY
Counsel of Record
STRASBURGER & PRICE, L.L.P.
300 Convent Street, Suite 900
San Antonio, Texas 78205
Telephone: 210/250-6000
Facsimile: 210/250-6100

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

110 pp

QUESTIONS PRESENTED

1. As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to apply the Sherman Act to the conduct of a government-sanctioned monopoly in a foreign country?

2. Do the filed-tariff doctrine and the Federal Communications Act preclude a common law claim for tortious interference when a telecommunications carrier provides its customer's telephone numbers to the PTT partner who then blocks the customer's service, when the carrier's tariff provides that "800 international call coverage may not be acquired or used for resale in a foreign jurisdiction where the carrier's PTT partner has either blocked or interrupted service or threatened to do so because of resale activities being conducted within the country by the carrier's customers"?

PARTIES TO THE PROCEEDING

The Petitioners are MCI Telecommunications Corporation and MCI International, Inc. The Respondent is Access Telecom, Inc. The other Defendants below were SBC Communications, Inc., SBC International, Inc., SBC International Latin America, Inc., and Telefonos de Mexico, S.A. de C.V.

CORPORATE DISCLOSURE

MCI Telecommunications Corporation changed its name to MCI WorldCom Network Services, Inc., effective May 7, 1999. MCI WorldCom Network Services, Inc., and MCI International, Inc., are wholly owned subsidiaries of WorldCom, Inc., formerly known as MCI WorldCom, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. THE FIFTH CIRCUIT'S FAILURE TO CONSIDER INTERNATIONAL COMITY CONCERNS IN ITS SHERMAN ACT ANALYSIS RAISES AN IMPORTANT QUESTION THAT THIS COURT HAS PREVIOUSLY RESERVED AND IS CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEAL	8
II. A CLAIM FOR TORTIOUS INTERFERENCE BASED ON A CARRIER'S PROVISION OF ITS CUSTOMER'S TELEPHONE NUMBERS TO AN INTERCONNECTING CARRIER IS PREEMPTED BY THE FILED TARIFF DOCTRINE	11
CONCLUSION	15
APPENDIX	
Fifth Circuit Opinion, December 1, 1999	App. 1

TABLE OF CONTENTS – Continued

Page

Fifth Circuit Judgment, December 1, 1999 ....App. 48

Order of the United States District Court for the Western District of Texas, August 5, 1999 ....App. 50

Judgment of the United States District Court for the Western District of Texas, August 5, 1999 ..App. 86

Order denying Motion for Rehearing and Motion for Rehearing *En Banc*, February 15, 2000 .....App. 88

TABLE OF AUTHORITIES

Page

CASES:

AT&T v. Central Office Telephone, Inc., 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998)..... 13

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)..... 2

In re Via USA, Ltd., 9 FCC Rcd 2288 (1994) 14

Long Distance International, Inc., et al. v. Telefonos de Mexico, S.A., et al., 2000 WL 101220 (Tex. App. – San Antonio Jan. 31, 2000), *petition for review pending* (unpublished) 8, 9

STATUTES:

Federal Communications Act, 47 U.S.C. § 203(a) (1934)..... 11

PETITION FOR WRIT OF CERTIORARI

MCI Telecommunications Corporation and MCI International, Inc. (collectively "MCI") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 197 F.3d 694 (5th Cir. 1999). A copy of the opinion is included in the Appendix at App. 1. The opinion of the United States District Court for the Western District of Texas is unreported and included in the Appendix at App. 50. The District Court judgment of August 5, 1998, is printed in the Appendix at App. 86.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on December 1, 1999. On December 15, 1999, Petitioners filed a Motion for Rehearing and Motion for Rehearing *En Banc* which the United States Court of Appeals denied on February 15, 2000 (App. at 88-89). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case raises important questions concerning the application of American antitrust laws to activities in another country, questions left unanswered in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993).

During 1993, MCI Telecommunications Corp. (MCI) sold long distance service to Access Telecom, Inc. (ATI), a corporation incorporated in Texas (Tab C to MCI Appendix to Motion for Summary Judgment). ATI resold MCI's service to customers in Mexico (Tab B to MCI Appendix to Motion for Summary Judgment). ATI's contracts with MCI incorporated the terms and conditions of MCI's tariff which provided that MCI 800 international call coverage could not be acquired or used for resale in foreign jurisdictions where MCI's PTT partners had either blocked or interrupted MCI 800 or threatened to do so because of resale activities being conducted within that country by MCI customers (Tab D to MCI Appendix to Motion for Summary Judgment). The tariff also stated that MCI was not liable for acts or omissions of other companies furnishing portions of the service. *Id.* The tariff prohibited the use of MCI services for any unlawful purpose. *Id.*

In order to transition from a telecommunications monopoly to a competitive market, Mexico granted Telefonos de Mexico (Telmex) an exclusive concession to provide long distance service in Mexico until August 10, 1996 (*see* Amended Concession, Tab F-5 to MCI Appendix to Motion for Summary Judgment). Mexican law required a permit to be a provider of telecommunications services

in Mexico and prevented commercialization except by a concession holder without approval of the Secretary of Communications and Transportation (SCT), the agency regulating telecommunications in Mexico (App. at 3). ATI never obtained a permit from the SCT or authorization from Telmex to sell long distance service in Mexico. *Id.*

In October of 1993, Jose Rivas Moncayo of the Office of the Mexican Secretary of Communications and Transportation (SCT), sent MCI a letter notifying MCI that Telmex was the exclusive provider of international service from Mexico, that the SCT had become aware, among other things, that long distance service from Mexico was being offered utilizing 800 numbers and bypassing Telmex, and that this practice was illegal and violated the exclusive franchise given to Telmex by the federal government (Tab E, Ex. A to MCI Appendix to Motion for Summary Judgment). On April 19, 1994, Telmex notified MCI of its intention to disconnect customers who were using its service for resale (Tab E, Ex. B to MCI Appendix to Motion for Summary Judgment). The list of 85 customers that it provided, however, did not include ATI. *Id.* On April 29, 1994, MCI received another letter, requesting a list of customers in the resale business (Tab E, Ex. D to MCI Appendix to Motion for Summary Judgment). MCI refused to provide such a list (Tab E, Ex. E to MCI Appendix to Motion for Summary Judgment).

On July 21, 1994, Telmex began disconnecting 800 numbers without warning (Tab E, Ex. F to MCI Appendix to Motion for Summary Judgment). On September 12, 1994, Telmex wrote MCI stating its intent to disconnect illegal resellers in Mexico, reiterating that the SCT notified all correspondent U.S. carriers on October 4, 1993,

that resale in Mexico was illegal and that it was Telmex' intent whenever it found any resale activity to disconnect whomever was acting in an illegal manner (Tab E, Ex. G to MCI Appendix to Motion for Summary Judgment).

On October 10, 1994, Telmex sent MCI a list of prohibitions on the use of 800 numbers, including that 800 could not be used for resale from Mexico and that its use in an unauthorized manner would be terminated immediately without notice and that if unauthorized use continued, Telmex would terminate all MCI activity in Mexico without notice (Tab E, Ex. I to MCI Appendix to Motion for Summary Judgment). In October 1994, additional ATI numbers were disconnected by Telmex. ATI sought alternative service from AT&T. MCI inquired of Telmex how AT&T could provide 800 service to ATI in Mexico if Telmex would not permit MCI to provide such service. Ultimately, ATI's business failed.

MCI maintains that it never provided or confirmed ATI's numbers to Telmex. The Court of Appeals found that there was a disputed issue of fact whether MCI provided the numbers to Telmex (App. at 27).

ATI refused to pay its bill to MCI. In June 1995, MCI commenced arbitration proceedings seeking to recover payment of ATI's phone bill, ultimately receiving an award for nearly $1.2 million (Tab B to MCI Appendix to Motion for Summary Judgment). In July 1995, ATI filed suit in state court alleging that MCI interfered with contractual and business relationships. That suit was removed to federal court and dismissed on ATI's motion. ATI then filed a third suit in Texas state court against

Telmex, SBC, and MCI alleging claims of breach of contract, tortious interference with a contract, negligent misrepresentation, promissory estoppel, and federal and state antitrust violations (App. at 52). The case was removed to federal court. The federal court granted Telmex' motion to dismiss all claims against it for lack of personal jurisdiction (Telmex App. at 6a at 113-24). ATI moved for partial summary judgment on the issue of the lawfulness of its activities which the District Court denied (Telmex App. at 101a-102a).

MCI moved for summary judgment on all of ATI's claims which the District Court granted (App. at 50-85). The Court held that the filed tariff doctrine barred ATI's claims for negligent misrepresentation and breach of contract (App. at 63-70). The District Court granted summary judgment on the promissory estoppel claim, holding that ATI could not justifiably rely on representations by MCI as to Mexican law (App. at 70-75). The District Court held that ATI could not recover on its claim alleging that MCI tortiously interfered with ATI's customer contracts because this was essentially a breach of contract claim and was barred by the limitation of liability provisions contained in MCI's tariff (App. at 75-79). In addition, the Court rejected ATI's claim that MCI conspired with Telmex and SBC to block ATI from contracting with AT&T because ATI never sought or obtained a permit from the SCT, and thus, ATI's prospective relations with AT&T would have been illegal (App. at 79). Finally, the District Court rejected ATI's antitrust claims because the conduct of which ATI complained occurred in Mexico, the market

from which ATI claimed to have been excluded was international 800 service in Mexico, and the results and economic consequences were felt predominantly by Mexican consumers (App. at 83-84). Because Texas antitrust laws do not reach activities exempt from the operation of federal antitrust laws, the District Court also granted MCI summary judgment on ATI's claim for violation of Texas antitrust laws (App. at 85).

On appeal, ATI challenged the dismissal of its tortious interference and antitrust claims, the denial of summary judgment in ATI's favor with respect to the lawfulness of ATI's activities, and the dismissal of Telmex on personal jurisdiction grounds (App. at 7). The Court of Appeals reversed and remanded (App. at 48). The Court of Appeals held that for the purpose of determining whether ATI's contracts with its customers were legal, Texas had the most significant relationship to the transaction, even though the place where the contracts were negotiated was Mexico; the place where the contracts were entered into was Mexico; the place where the service was provided was Mexico; the residence, domicile, nationality, and place of business of ATI's customers was Mexico; the place where the service was cut off by Telmex was Mexico; the alleged monopoly was in Mexico; and the customers allegedly injured were in Mexico (App. at 10-15).

In the context of the state law tortious interference claim, the Court of Appeals held that Mexican law did not demand comity under Texas law, and even if Mexican law prohibited the resale of already resold telecommunications services or prohibited the importing of U.S. telecommunications services, those facts would not serve as a

defense to a claim of tortious interference when the alleged tortfeasor was not forced to choose between violating foreign law or suffering U.S. liability (App. at 20).

The Court of Appeals held that MCI was not privileged to protect itself by disclosing ATI's confidential information (App. at 23-24). The Court further held that MCI's tariff did not preclude a tortious interference claim because MCI's alleged release of confidential information, ATI's phone numbers, did not concern the provision of services covered by the filed tariff, but rather concerned illegal actions outside the scope of the tariff and not derivative of any phone services (App. at 24-25).

The Court of Appeals held that the filed tariff did not preclude liability even though MCI's tariff provided MCI service could not be acquired or used for resale in foreign jurisdictions once MCI's foreign partner had blocked or interrupted MCI's service or threatened to do so, which is exactly what occurred, because MCI did not halt the service itself, but provided telephone numbers to Telmex so that Telmex could halt the service (App. at 26). The Court of Appeals held that because ATI's claim that MCI provided the numbers to Telmex breached an affirmative duty imposed outside the contract, it was not barred by the filed tariff (App. at 27).

With reference to the Sherman Act, the Court of Appeals reversed the District Court, finding that ATI had made a *prima facie* showing of a direct and substantial effect on export trade. The substantial effect was that ATI's business, as well as that of other companies, failed "resulting in an inability to sell its U.S. telephone switching services to all Mexican customers" (App. at 28).

Finally, the Court of Appeals held that ATI's operations were legal under Mexican law (App. at 29-37), despite a recent Texas state court appellate opinion that reached the opposite conclusion on identical facts.[1]

Petitioners' request for *en banc* review was denied on February 15, 2000 (App. at 88).

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S FAILURE TO CONSIDER INTERNATIONAL COMITY CONCERNS IN ITS SHERMAN ACT ANALYSIS RAISES AN IMPORTANT QUESTION THAT THIS COURT HAS PREVIOUSLY RESERVED AND IS CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEAL

MCI concurs that this case raises significant comity concerns as briefed in the petitions for certiorari filed by the SBC entities and Telefonos de Mexico, S.A. de C.V., and adopts the arguments made in those petitions. It also presents a dilemma to a multinational corporation attempting to comply with the laws of all the jurisdictions in which it does business.

The Court of Appeals held that the Sherman Act applied because ATI's activities were not illegal under the laws of Mexico. Nevertheless, the agency charged with regulating telecommunications services in Mexico, the

---

[1] *Long Distance International, Inc., et al. v. Telefonos de Mexico, S.A., et al.*, 2000 WL 101220 (Tex. App. – San Antonio Jan. 31, 2000), *petition for review pending* (unpublished).

SCT, and the Mexican Federal Telecommunications Commission, a regulatory body equivalent to the FCC, asserted and continue to insist that ATI's services were illegal in Mexico.[2] This placed MCI in precisely the dilemma that the Court of Appeals found did not exist – being forced to choose between U.S. damages and Mexican liability. Under the Court of Appeals' decision, MCI had the choice of cooperating with Telmex and paying damages for tortious interference and antitrust under U.S. laws or refusing to cooperate with Telmex and having all its business in Mexico terminated. MCI should not be put to such a Hobson's choice.

The situation is exacerbated by a conflict between the state and federal courts. The Texas state court found that ATI's business was illegal under Mexican law. *Long Distance International, Inc., et al. v. Telefonos de Mexico, S.A., et al.*, 2000 WL 101220 (Tex. App. – San Antonio Jan. 31, 2000), *petition for review pending* (unpublished). The Fifth Circuit found that ATI's business in Mexico was legal. Thus, for tortious interference claims there will be a different outcome depending on whether the case is tried in state or federal court.

United States multinational corporations should not be whipsawed between separate sovereigns. It is not enough to say that Mexican authorities are mistaken about their own law. As long as Mexican authorities have

---

[2] Brief of *Amici Curiae* the Secretary of Communications and Transportation of Mexico and the Federal Telecommunications Commission of Mexico in Support of Petitions for Rehearing and Suggestions for Rehearing *En Banc* at 5-6.

the power to construe and enforce their own laws in their own country, there is a real conflict. MCI did what it could to resolve the conflict by making provision for it in its tariff. Under the tariff, if Telmex disconnected or threatened to disconnect because of resale, MCI had no liability, whether or not Telmex was legally authorized to do so. But the Court of Appeals refused to enforce the tariff.

This Court should grant certiorari to formulate a coherent federal doctrine specifying choice of law methodology in transnational cases so that international companies will have some certainty and predictability as to probable outcomes. Supreme Court guidance is crucial in formulating rules designed to foster amicable and workable commercial relations and to avoid retaliatory action by other countries. The need for courts to apply some restraint in giving extraterritorial effect to United States antitrust laws is especially important in private actions where economic and foreign policy considerations are unlikely to influence those bringing the actions. The absence of such mechanisms for avoiding conflict between sovereigns is disruptive of international economic cooperation. The United States should not simply apply its own law to transactions that have an impact on its national economy, however much the same transactions may affect the economy of another country. This case presents an opportunity to clarify the kinds of international comity concerns that are significant to Sherman Act analysis and that the Fifth Circuit failed to consider. The petition for certiorari should be granted.

II. A CLAIM FOR TORTIOUS INTERFERENCE BASED ON A CARRIER'S PROVISION OF ITS CUSTOMER'S TELEPHONE NUMBERS TO AN INTERCONNECTING CARRIER IS PREEMPTED BY THE FILED TARIFF DOCTRINE

Petitioner provides long distance services, and as a common carrier under the Federal Communications Act, it must file tariffs containing charges for services and all classifications, practices, and regulations affecting such charges. 47 U.S.C. § 203(a). As part of the tariff for its international 800 service, MCI filed a tariff which provided that MCI would not be liable if MCI's PTT partner in a foreign jurisdiction blocked resale in that country (Tab D, Ex. A to MCI Appendix to Motion for Summary Judgment). Telmex blocked ATI's service in Mexico because resale was prohibited by Mexican law. ATI then sued MCI for tortious interference, alleging that MCI gave its telephone numbers to Telmex so that Telmex could disconnect its service. MCI maintained that ATI could not recover because MCI's tariff precluded liability. The Court of Appeals thought the filed rate doctrine inapplicable because MCI's conduct in giving ATI's telephone numbers to a connecting carrier did not concern the provision of services which were covered by the tariff, but rather concerned illegal actions outside the scope of the tariff and not derivative of any phone services (App. at 26). Rates, however, do not exist in a vacuum. The limitations of liability set forth in MCI's tariff are an inherent part of the rate. The more exposure MCI has, the higher its rates must be. Common carriers

are able to provide telephone service at reasonable rates because their liability is limited by their tariffs.

MCI's tariff had provisions addressing the exact situation that occurred in this case – what would happen if international 800 used for resale in a foreign country was blocked by the telephone company in that country. Telmex disconnected ATI's numbers because in Telmex' view ATI was engaged in prohibited resale. MCI's tariff prohibited resale in any foreign jurisdiction, including Mexico, where the PTT partner (Telmex) had blocked or interrupted MCI 800 or threatened to do so. Under the express terms of the tariff, if Telmex blocked the service or threatened to block it, then MCI could have no liability. Whether Telmex blocked service legally or not was irrelevant under the tariff.

Assuming *arguendo* that MCI did supply the numbers to Telmex, that fact would not strip MCI of the protections of its tariff. The alleged tortious interference with the contracts between ATI and its customers and prospective customers was the disconnection of ATI's service. MCI's provision of the numbers to Telmex did not affect ATI's customers' service in any way. It was not until Telmex disconnected the numbers that there was interference. If Telmex had not disconnected the numbers, there would have been no interference even if MCI had given the numbers to Telmex. The disconnection was the interference. Disconnection was the precise situation that the tariff addressed. To say, as the Court of Appeals did, that MCI could stop service without liability, but that MCI could not disclose the numbers to Telmex so that Telmex

could stop service, is a distinction without a difference. If MCI had no liability for stopping service directly, it could have no liability for stopping service indirectly.

To the extent that ATI's claim was that MCI was unable to provide international 800 service so that ATI was unable to provide it to ATI's customers in Mexico and unable to obtain new customers, that is a purely derivative claim barred by *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998). In that case, Central Office Telephone ("COT"), a reseller like ATI in this case, purchased service from AT&T and resold it to its customers. The parties' written subscription agreements, like the ones in this case, incorporated by reference the tariff the carrier was required to file with the Federal Communications Commission. Like ATI, the reseller sued AT&T for tortious interference (*viz.* COT's contracts with its customers). This Court held that plaintiff's claims for tortious interference were barred by the filed rate doctrine. Here, to the extent that ATI is claiming that its contracts with its customers were interfered with by MCI's failure to provide international 800 service, its claim is identical to the tortious interference claim this Court held barred in *COT*.

The Court of Appeals reasoned that the tariff did not apply because MCI breached a duty imposed by law unrelated to any service MCI was providing to ATI. Presumably, the duty was a duty not to give confidential information to a connecting carrier. No source of the duty is identified. The confidential information MCI was alleged to have provided was telephone numbers. Telephone numbers are not confidential, as anyone who has

ever called directory assistance or used a telephone directory knows. More fundamentally, the alleged confidential information MCI gave Telmex was not unrelated to the service MCI was providing under the tariff. There cannot be telephone service without telephone numbers. Moreover, there is no way an interconnecting carrier could carry traffic without programming the numbers into its switch. Not only is there no law prohibiting disclosure of telephone numbers to a connecting carrier, but also, as a practical matter, it would be impossible for a connecting carrier to carry the traffic without programming the numbers into its switch.

ATI's application was not novel. U.S. telephone rates are the cheapest in the world. As long as differential phone rates have existed, ways to have calls billed at the cheaper U.S. rate rather than the rate in the country of origin have existed. *In re Via USA, Ltd.*, 9 FCC Rcd 2288 ¶ 27 (1994). Foreign countries frequently police these attempts to circumvent their telephone systems by imposing concession arrangements which have the effect of requiring administrative approval or licensing of all activities not vested in the national provider. *Id.* This situation is well known in the industry and specifically addressed in the tariff. The limitation of liability provisions in the tariff are an integral part of the rates. Because MCI did not have control over foreign PTT partners who necessarily have to carry calls in their country on their network, the tariff precluded MCI's responsibility for actions of "other company or companies furnishing a portion of the service."

MCI's tariff insulating it from liability for the action of foreign PTT partners was not unusual. If a carrier loses

the protections of its tariff because it provides its customers' telephone numbers to an interconnecting carrier, no U.S. carrier will be protected from liability for the actions of foreign PTT partners because every carrier must provide telephone numbers to the interconnecting carrier so that traffic can be carried on its network. This typical tariff provision will become a nullity.

Likewise, the Court of Appeals reasoned that it was improper for MCI to disclose ATI's numbers to AT&T. Yet, that disclosure was expressly requested by ATI which wanted to "port," that is, transfer, its numbers from MCI to AT&T. In other words, ATI wanted to keep its telephone numbers but change carriers. There was no way to do this without disclosing the telephone numbers to AT&T. Thus, MCI's requested disclosure to AT&T cannot be the basis for tortious interference.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JUDITH R. BLAKEWAY
Counsel of Record
STRASBURGER & PRICE, L.L.P.
300 Convent Street, Suite 900
San Antonio, Texas 78205
(210) 250-6000
Attorneys for Petitioners

May 12, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50881

ACCESS TELECOM, INC.,

Plaintiff-Appellant,

versus

MCI TELECOMMUNICATIONS CORPORATION;
MCI INTERNATIONAL, INC.;
SBC COMMUNICATIONS, INC.;
SBC INTERNATIONAL, INC.;
SBC INTERNATIONAL LATIN AMERICA;
TELEFONOS DE MEXICO,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(Filed Dec. 01, 1999)

Before REYNALDO G. GARZA, HIGGINBOTHAM and DAVIS, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

I.

During 1993 and 1994, Access Telecom, Inc. (ATI), a corporation based in Texas, exported U.S. phone services to customers in Mexico. These services allowed Mexican customers to place U.S.-based phone calls directly from

Mexico. Customers first called ATI in Texas and then entered the new phone number they wanted to call. ATI dialed that new number from the U.S. and effectively spliced the customer's first call to the new call, enabling the customer to communicate with the new destination. As a result, each call had two legs: the Mexican leg from Mexico to Texas and the U.S. leg from Texas to the final destination.[1]

The benefit to ATI's customers from this arrangement was that the cost of the two-legged call was less than the cost of a normal call from Mexico through Teléfonos de México (Telmex). The price discrepancy existed because Telmex had a government granted monopoly until 1996. Thus, the rate on a typical call from Mexico to California was controlled by Telmex for its entire length. Under ATI's setup, Telmex controlled only the rate for the Mexican leg of the call. The applicable rate for the U.S. leg of the call was a U.S. rate.

The Mexican leg of each call was carried on toll free numbers that ATI received from MCI. MCI in turn leased the lines for these numbers from Telmex. In other words, MCI leased the Telmex lines that connected Mexico to Texas. Telmex's lines crossed the border into Texas where they interconnected with U.S. lines. Telmex's contracts with MCI apparently neither foresaw nor forbid the subsequent "reorigination" as practiced by ATI or other companies, and in fact, MCI offered similar reorigination services of its own.

---

[1] At some point, ATI also employed switching services in New York.

ATI's contracts with MCI incorporated the terms and conditions of MCI's U.S. "filed tariff" which provided that MCI calls may not be acquired and used for resale in foreign jurisdictions once MCI's foreign partners have blocked or interrupted MCI or have threatened to do so for such reasons. The tariff also stated that MCI was not liable for acts or omissions of other companies who furnished a portion of MCI's 800 service. Finally, the tariff prohibited the use of MCI services for unlawful purposes.

Mexican law required a permit to be a provider of telecommunications services in Mexico. ATI never obtained such a permit, maintaining it did not need to do so because it was not a provider. Under ATI's interpretation of Mexican law, a provider was an entity that both owned and operated telecommunications infrastructure within Mexico, which ATI did not do (as opposed to reselling service directly or indirectly, which ATI perhaps did do). Subsequent to the time period relevant in this lawsuit, Mexico revamped its telecommunications laws and now explicitly requires a permit to engage in resale activity.

In October 1993, Jose Rivas Moncayo of the office of the Mexican Secretary of Communications and Transportation (SCT), sent MCI a letter requesting that MCI halt the services of companies offering "call-back services." Call-back involved a procedure whereby a customer called a U.S. company, and the U.S. company did not answer the call. Instead, the company would use a form of caller-id to locate the customer and then call the customer back. Under call-back services, Telmex received no revenue for the initial outbound call because that call was never "answered." Such services used Telmex phone lines

to communicate location information without paying Telmex anything for that privilege. ATI's service, however, paid Telmex exactly what Telmex had contracted with MCI to receive for outbound calls using the lines from Mexico to Texas. ATI's service did not operate through call-back, and MCI did not terminate ATI's service. Subsequent to the time period relevant in this lawsuit, the SCT issued further communications condemning practices that achieve similar results as "call-back" services.

On April 19, 1994, Telmex notified MCI of its intention to disconnect customers who were using its service for resale. The list of 85 customers that it provided, however, did not include ATI. On April 29, 1994, MCI received another letter, requesting a list of customers in the resale business, but MCI refused to provide such a list. The letter requesting customers was written on Telmex letterhead by an employee of SBC International, a subsidiary of Southwestern Bell. Southwestern Bell is part of a consortium that owns a controlling stake in Telmex.

Telmex allegedly began disconnecting 800 numbers on July 21, 1994, without warning. Previously it had assured MCI that it would give notice of disconnection so MCI could warn MCI's customers. On September 28, 1994, Telmex sent MCI a list of prohibitions on the use of MCI's numbers, threatening to terminate all of MCI's Mexican business without notice if MCI did not cooperate. ATI's numbers, save three, were disconnected on October 19, 1994; the rest were disconnected soon thereafter. At this time, ATI was earning approximately $3 million a year.

There is disagreement whether MCI provided Telmex with ATI's numbers. According to the deposition of Carol Ansley, an SBC employee, Ansley sent Rafael Perez Aguilar of Telmex a list of ATI's numbers, and Ansley testified that as far as she knew, MCI had not provided SBC with ATI's numbers. ATI, however, discovered a cover memo written by Ansley, stating that "attached you will find a list of I-800 numbers MCI has identified as being with Access Telecom." ATI also notes that John Bachman, an MCI manager, sent an e-mail on October 18, to an MCI employee, Laura Alvarado, instructing her to "take down" ATI's numbers. In Alvarado's deposition, however, she insists that she did not provide the numbers to Telmex. Even MCI has stated that the provision of ATI's numbers to third parties without permission would be in violation of U.S. law.

In an effort to continue providing service to its customers, ATI sought alternative service from AT&T. According to ATI, MCI immediately informed SBC and Telmex of ATI's attempt to obtain service from AT&T. Telmex allegedly assured MCI that ATI would not be able to reestablish the numbers through AT&T. ATI ultimately could not obtain alternate service through AT&T. ATI's business collapsed, along with approximately 80 other similar U.S. companies.

II.

In June 1995, MCI commenced arbitration proceedings seeking to recover payment of ATI's phone bill, ultimately receiving an award for nearly $1.2 million. In July 1995, ATI sued Telmex, SBC, and MCI in Texas state

court, alleging claims of breach of contract, tortious interference with contract, negligent misrepresentation, promissory estoppel and federal and state antitrust violations. The case was removed and transferred to the Western District of Texas. The federal court granted Telmex's motion to dismiss all claims against it for lack of personal jurisdiction.

ATI moved for partial summary judgment on the issue of the lawfulness of its activities, which the district court denied. MCI and SBC moved for summary judgment on all of ATI's claims, which the district court granted. The court held that the filed tariff doctrine barred ATI's claims for negligent misrepresentation and breach of contract. The district court granted summary judgment on a promissory estoppel claim, holding that ATI could not justifiably rely on representations by MCI as to Mexican law.

The district court also held that ATI could not recover on its claim alleging that MCI tortiously interfered with ATI's customer contracts because this was essentially a breach of contract claim and was barred by limitation of liability provisions in MCI's tariff. In addition, the court rejected ATI's claim that MCI conspired with Telmex and SBC to block ATI from contracting with AT&T for service because ATI never sought or obtained a permit from the SCT and thus ATI's prospective relations with AT&T would have been illegal. Finally, the district court rejected ATI's antitrust claims on the ground that the conduct of which ATI complained did not have a direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce or export business.

On appeal, ATI challenges the dismissal of its tortious interference and antitrust claims, the denial of summary judgment in ATI's favor with respect to the lawfulness of ATI's activities, and the dismissal of Telmex on personal jurisdiction grounds. ATI separately complains that merits discovery was improperly limited.

III.

A. Characterization of ATI's Business

The proper resolution of many issues in this case depends on the characterization of ATI's business. ATI characterizes its business as exporting U.S. reorigination services to Mexican customers. The defendants characterize ATI's business as providing a Mexican telecommunications service in Mexico. At first glance, the defendant's characterization has appeal. No matter how ATI's business is described, the end result enabled Mexican customers to make long distance phone calls in Mexico for prices less than those generally charged by the Telmex monopoly. This characterization, however, confuses the ends with the means.

In the past, phone calls may have been seen as indivisible commodities. Today, that is too simple a view. Admittedly, by selling the "U.S. leg" of a call to Mexican customers, ATI enabled cheaper long distance communication. That is not the same as being a Mexican telecommunications provider. A distinction exists between "provider" and "reseller," which is easier to see in a more familiar context.

If ATI and Telmex were shipping companies, ATI might transport goods solely between U.S. cities. If Mexican customers shipped their goods to ATI in Texas, ATI could then transport them to another destination in the U.S. Alternatively, Mexican customers could ship directly to their final destination using Telmex alone. Shipping to New York via ATI might be cheaper, however, than shipping via Telmex. To say that ATI is a Mexican shipping provider would be imprecise. No matter which company the customer uses, Telmex, as a monopoly, is the only provider of shipping service from Mexico to Texas, and in every instance Telmex receives the previously agreed rate for its services. Thus, in Mexico, ATI is at most a reseller of Telmex's shipping service, although even the label of "reseller" is debatable.

To equate resale with provision, however, entails that every business is a provider if that business ships goods to its customers via Telmex and charges the customer for the shipping cost. In our case it would entail that every business which has a toll free number, yet which charges the cost of the phone service back to the customers, is a telecommunications provider because it technically is "reselling" phone service. This ignores the crucial difference between resellers and providers, which is that a reseller cannot compete with a monopoly provider because the provider is the reseller's only supplier. The reseller can only undersell the provider if the provider sells its services to the reseller for less than they are worth. That is not the same kind of competition a provider faces against another provider. Competition between the provider and the reseller is at the mercy of

the provider and the provider's knowledge or ignorance of the market.

Because of this difference, it is more appropriate to characterize ATI as an exporter of U.S. phone services who incidentally and indirectly resold Mexican telecommunications services. In a real sense, ATI was not even the primary reseller of Mexican telecommunications services. MCI was the reseller, under contract from Telmex. ATI purchased MCI's services and MCI billed ATI for the calls made to ATI's numbers by ATI's customers who were purchasing U.S. service. ATI may have recouped the cost of the Mexican leg of the call from its customers just as any other business may recoup the cost of toll free phone service through its service fees. ATI's setup is thus the same as any American business which contracted to offer toll free 800 numbers to Mexican customers in order to provide service across the phones, such as touch tone brokerage service or even $3.95/minute astrological advice. The only difference is that ATI offered U.S. phone service rather than another service delivered by phone. While this may make ATI appear to be a Mexican "provider," this ignores the foregoing distinctions. To not distinguish between direct providers, direct resellers, and indirect resellers ignores the competitive reality that it is the providers who determine whether subsequent resales are profitable; it also leads to the illogical result that all businesses are telecommunications providers. This characterization of ATI's business is compatible with one interpretation of the laws which were in place in Mexico at the time, requiring permits only for the joint installation, operation, *and* exploitation of infrastructure. ATI's claim that the "and" has its normal conjunctive meaning

agrees with these distinctions, because this reading separates true providers from mere resellers. With these distinctions in mind, we now address the tortious interference issues.

B. Tortious Interference

1. Choice of Law

To properly decide the tortious interference issues, we must make three choice of law decisions: first, which law governs ATI's tort cause of action; second, which law governs the validity of the contracts and prospective business relations which form the basis of the tortious interference claims; and third, whether any foreign law invalidates the contracts for other reasons. A federal district court must follow the choice-of-law rules of the state in which it sits. *See, e.g., St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 205 (5th Cir. 1996).

(a) Tort Choice of Law

The first choice is which law governs ATI's tort cause of action. Texas follows the most significant relationship test of the Restatement (Second) of Conflict of Laws § 145, for these decisions. *See Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). Under the modern "most significant relationship" test, courts considers: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties, if any, is centered. *See SnyderGeneral*

Corp. v. Great Am. Ins., 928 F. Supp. 674, 677 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998). Since Texas was the site of injury, home to the injured business, and place of export of the U.S. portion of the business, it would be reasonable to apply Texas law; however, the parties appear to assume without argument that Texas law governs, and so, without deciding, shall we.

Thus, we examine Texas law to determine the requirements for a tortious interference claim. Under Texas law, the existence of a valid contract (or the potential for one in claims for interference with prospective contracts) is an element of a claim for tortious interference. *See Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*, 793 S.W.2d 660, 665 (Tex.1990). There is no remedy for interference with illegal contracts, *see Ben E. Keith Co. v. Lisle Todd Leasing, Inc.*, 734 S.W.2d 725, 727 (Tex. App.-Dallas 1987, writ ref'd n.r.e.).

(b) Contract Choice of Law

The ATI contracts at issue in this case include ATI's contracts with its Mexican customers, ATI's contracts with MCI, and ATI's attempted contracts with AT&T. The second choice of law question arises because we must determine whether these contracts were valid. Validity of a contract, however, is determined by the law which governs the contract, which calls for another choice of law analysis, this time using the modern "most significant relationship" test of the Restatement (Second) of Conflict of Laws as applied to contracts, which Texas has adopted. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984).

ATI, based in Texas, exported Texas reorigination services to Mexican customers and resold Mexican telecommunications service. These customer contracts had choice of law provisions identifying Texas as the applicable law and place of formation. In Texas, contractual choice-of-law provisions are ordinarily enforced if the chosen forum has a substantial relationship to the parties and the transaction. *See De Santis v. Wackenhut,* 793 S.W.2d 670, 677-78 (Tex. 1990). However, a choice-of-law provision will not be applied if another jurisdiction has a more significant relationship with the parties and their transaction than the state they choose, that jurisdiction has a materially greater interest than the chosen state, and the jurisdiction's fundamental policy would be contravened by the application of the law of the chosen state. *See* Restatement (Second) of Conflict of Laws § 187.

The defendants argue that the choice of law clauses in the ATI customer contracts are not determinative, because these contracts concerned issues of payment and formation, mostly stating that the contracts were formed in Texas and would be payable in Texas in U.S. dollars. The contracts did not concern the terms of ATI's actual provision of service. It is true that contractual choice of law clauses are construed narrowly. *See Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.,* 100 F.3d 429 (5th Cir. 1996). However, the defendants' argument cuts both ways. To the degree that these contracts do not concern the services allegedly illegal in Mexico, it becomes harder to argue illegality of those contracts under Mexican or Texas law; furthermore, so long as these contracts were interfered with, the fact that a separate service agreement was not interfered with does not

matter, since the interference claim only needs one contract as its basis.

Without deciding how determinative the choice of law clauses are, however, it appears that there is no demand to choose Mexican over Texas law under a most significant relationship test. The Restatement § 188 states that

> [i]n the absence of an effective choice of law by the parties . . . the contracts to be taken into account . . . to determine the law applicable to an issue include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

In this case, we have a very symmetric relationship between the parties and the services provided. Each forum is home to one of the parties, one forum's business is exporting services, the other forum's resident is receiving services, the U.S. favors competition in telecommunications, Mexico at the time did not. ATI's indirect resale of the Mexican leg of the service may center in Mexico, but even a portion of that service occurs in Texas, since Telmex's lines cross into Texas and interconnect at the border. Further, that service was provided by MCI under agreements with Telmex and ATI, and the ATI-MCI agreements were entered into in Texas. Even assuming the Mexican leg of the calls implicates Mexican interests more than Texas interests, the remaining contacts that ATI's contracts had with Texas, including the choice of law

clause which is of some weight, is at least a deciding factor in such a close case.

This makes sense if one looks at the fundamental policies involved, which include Mexico's interest in a domestic telephone monopoly. Mexico would not have a fundamental policy contravened by the application of Texas law in this case. The export of U.S. telecommunication services and even the resale of Mexican services does not contravene Mexico's legitimate monopoly over its domestic lines. Telmex can charge whatever it likes for incoming and outgoing calls on its lines. The resale of the Mexican leg either directly by MCI or indirectly by ATI is only profitable if Telmex allows it to be. If Telmex sets a monopoly price for its initial service, Telmex recoups all potential monopoly revenues from that fee. Telmex may wish to use its monopoly as leverage in order to gain higher revenues from the U.S. leg of calls, but attempts to tie domestic monopoly power into the international market is not within the scope of the domestic monopoly. As such, it is not a Mexican interest which tips the scale in Mexico's favor.

Texas, on the other hand, would have a fundamental policy contravened by the choice of Mexican law (assuming Mexican law is different on the question of contract validity), namely the ability of Texas companies to make valid export contracts in Texas for the sale of U.S. services.

The remaining contracts and prospective contracts are more obviously governed by Texas law. ATI's contracts with MCI were negotiated and entered into in

Texas, between Texas businesses. ATI's potential contracts with AT&T presumably would have been similar. In this case, Mexico's only connection with these contracts is the fact that the contracts involve the use of Mexican lines for a portion of the calls. Given the fact that the parties are in the U.S., the contracts were made in the U.S., and that there is no claim that these contracts were illegal under Mexican law, there seems to be no reason to choose Mexican law to determine the validity of these contracts, despite the fact that part of their subject matter existed in Mexico.

We hold, then that Texas law determines the validity of the contracts and prospective contracts at issue in this case. However, this is still not the end of the analysis.

(c) Foreign Law Which Invalidates Contract Under Texas Law

Under Texas contract law, it is "well settled" that "[a] contract made 'with a view of violating the laws of another country, though not otherwise obnoxious to the laws either of the forum or of the place where the contract is made,' is illegal and 'will not be enforced.' " *See Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 639 (Tex. App. – San Antonio 1993, writ denied) (quoting *San Benito Bank & Trust Co. v. Rio Grande Music Co.*, 686 S.W.2d 635, 638 (Tex. App. – Corpus Christi 1984, writ ref'd n.r.e.)).

This rule has not been analyzed by the Texas appellate courts which have relied on it, and the Texas

Supreme Court has not adopted this rule expressly.[2] "To determine state substantive law, we look to final decisions of the state's highest court." *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 993 (5th Cir. 1999) (*citing Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992)). " 'When there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide.' " *See id.* (quoting *Transcontinental*, 953 F.2d at 988). Thus, we must make a guess as to how the Texas Supreme Court would interpret this rule. Because the Texas Supreme Court has chosen to follow modern choice of analysis, we proceed with that background assumption. As such, there are two aspects to this rule that must be discussed before it can be applied.

The first aspect is the rule's tacit assumption that foreign law is relevant to the contract in question. For example, there is no reason to suspect Texas courts would deem void a contract between Texans for the sale of cheese in Texas, even if Mexican law purported to make all sales of cheese illegal, even those occurring in Texas. Mexican law would be inapplicable to the contract in question because Mexico has no legitimate interest in the contract. The second aspect to consider is the meaning of "with a view." First, we discuss the rule's assumption that foreign law is relevant.

---

[2] "Writ refused, n.r.e." is not the same as "writ refused," in the writ history of Texas appellate cases. Only an unqualified "writ refused" must be treated as on equal footing with other Texas Supreme Court precedent. *See* Texas Jurisprudence, 3d § 145.

Historically, the assumption that the laws of a foreign country were relevant or applicable to a contract was justified if the contract was to be performed in the other country because place of performance or place of contract decided the choice of law question. *See* 6 WILLISTON ON CONTRACTS § 1749 (1938). Moreover, "good morals and the obligations of international comity demand denial of judicial sanction to the intentional breach of . . . the general laws of a friendly state." *Id.* Under modern choice of law analysis, however, place of performance or place of contract formation is not always determinative. Furthermore, principles of comity only extend so far. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994) (noting that comity "must yield to domestic policy" and "cannot compel a domestic court to uphold foreign interests at the expense of the public policies of the forum state").

As stated, modern choice of law analysis in Texas applies the law of the forum with the "most significant relationship" to the contract in question. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984). Thus, a contract legal in the U.S. may be illegal in Mexico, yet under choice of law analysis, Mexican law might not be chosen to apply. If Mexican law does not apply to determine validity, then to say the contract is illegal in Texas because it violates Mexican law reverts too quickly back to a discarded conclusion, a conclusion rooted in the traditional assumption that Mexican law always has an interest in the contract if some aspect of the contract is illegal under Mexican law.

There are at least two reasons to defer to foreign law, however, even if that law would not be chosen to govern

the contract. First, a contract legal in the U.S. and illegal in Mexico may places parties in a dilemma. They can either perform the contract and face Mexican liability (Mexico, after all, may have personal jurisdiction over the parties). On the other hand, the parties can breach the contract, but then face U.S. liability for contract damages. This dilemma, however, is not implicated in tortious interference claims, because by definition, the defendant is not a party to the original contract and thus need not choose between breaking foreign law or facing U.S. liability. A dilemma only exists to the third party if foreign law gives the third party a duty or right to interfere. No duty is alleged in this case with respect to MCI and SBC and the right to interfere (privilege) is addressed below.

A second, but more important, reason to defer to foreign law even if it does not apply to the contract is the mentioned principle of comity, which suggests that the U.S. should respect Mexican law on a kind of "golden rule" basis. The leading Texas case demonstrates this situation although without this explicit reasoning. *See Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629 (Tex. App.- San Antonio, 1993). In *Purina*, a contract to export goods into Mexico was found illegal in Texas because the parties were smugglers who did not have the necessary Mexican licenses. *Id.* at 639. Even if Texas law applied to that contract under a most significant relationship test, the principle of comity would be a strong basis to hold the Texas contract illegal under Texas law, and thus not a basis for a tortious interference claim. If there is no dilemma and there is no basis for comity, however, the old rule makes no sense under modern choice of law analysis which already takes into account the interests of

the various fora. To allow foreign law to jump back in and change the conclusion circumvents the principles behind the original choice of law.

The second aspect of the rule that must be analyzed is what "with a view" means. The language implies the existence of an intention on the part of at least one of the parties to violate foreign law. It is unclear whether the rule requires both parties to have illegal intentions, as it has been remarked that one party's mere knowledge of the other's illegal intentions is insufficient to void a contract. *See International Aircraft Sales, Inc. v. Betancourt*, 582 S.W.2d 632, 635 (Tex.Civ.App.-Corpus Christi May 31, 1979, writ refused n.r.e.). If intention did not matter, the rule could merely state that contracts which violate foreign law are illegal. The policy behind this part of the rule appears to be that it is against the public policy of the domestic forum to encourage willful attempts to break foreign law. Given these considerations, however, it makes no sense to apply the rule if there is no intention of either party to violate foreign law. More importantly, however, if foreign law is sufficiently unclear as to the legality of certain actions, then it is unreasonable to say the parties entered the contract with a view to violate anything.

Because the Texas Supreme Court has not addressed these issues, we consider how the court might decide the first issue, and we decide that when a contract governed by *Texas* law violates the laws of a foreign country, that violation does not void the contract for purposes of tortious interference claims if the foreign policies at issue do not demand comity. In this case, if Mexican law banned the import of U.S. switching services or the incidental

resale of Mexican capacity by a non-provider, it would be a policy designed to increase the monopoly power of a domestic company outside the territorial boundaries of that country. Such policies do not demand comity. It would not be the case of a country banning an import which is arguably injurious to the health or morals of its citizens, such as toxic waste or pornography. Instead, if ATI's activities were illegal in Mexico, then it would be an example of a country banning the import of a competitive service for which no legitimate monopoly exists. While it is fine for a country to take a protectionist position, the legality of U.S. contracts need not turn on it.

Because there is no "dilemma" alleged in the current case with respect to third parties being forced to choose between U.S. contract damages and Mexican liability, we do not decide the effect of such a dilemma on the rule.

Thus, even if Mexican law prohibited the resale of already resold telecommunications services or prohibited the importing of U.S. telecommunications services, these facts do not serve as a defense to a claim of tortious interference with such contracts in situations when the alleged tortfeasor is not forced to choose between violating foreign law or suffering U.S. liability, when Texas law otherwise governs the underlying contracts and torts.[3]

---

[3] For the purposes of this analysis, it is assumed that the SCT's refusal of a permit to ATI suffices to show exclusion from the Mexican market. This assumption is made without deciding that such a refusal shows a permit was legally required, but only that one was not readily available. Had one been easily available and a mere "formality," then it would not make sense to characterize Mexican law as protectionist.

An alternative basis to decide this issue, of course, would be that contracts entered "with a view" to violate foreign law are not void for the purposes of tortious interference claim if neither party to the contract had illegal intentions. An illegal intention is not shown in this case, at least for the purposes of summary judgment. As shown below, Mexican law at the time was sufficiently unclear and capable of multiple interpretations as to what was or was not legal. Such difficulty in interpreting foreign law makes it unreasonable to conclude any contract was entered with a view to violate foreign law. The fact that ATI attempted to get a permit "just in case," does not prevent them from successfully arguing that their service was legal and they believed it was legal. While the content of foreign law is a legal question, the question of ATI's intention is not, and there is sufficient evidence to permit a jury to conclude ATI was acting with the view that their services were legal; as such, summary judgment against ATI on the tortious interference claims would be improper unless ATI's activities were illegal under U.S. law or subject to another defense, as discussed below.

2. Validity Under U.S. Law

It remains to determine whether ATI's contracts and services were illegal with respect to U.S. law. The defendants assert that ATI's activities were contrary to 47 U.S.C. § 214, which requires authorization before a carrier "shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line." ATI,

however, merely provided a service that connected different lines and did not itself construct any new lines. Section 214 applies only to the construction of facilities and does not prevent carriers from offering new services. *See MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977).

Furthermore, even with respect to call-back, a practice truly hostile to a legitimate domestic monopoly, the FCC decided in 1995 that even call-back did not violate U.S. or international telecommunications law and only prohibited the service on comity grounds where "expressly prohibited" in the foreign country. *In re VIA USA, Ltd.*, 10 FCC Rcd. 9540 ¶¶ 50-51 (1995). Thus, during 1993 and 1994, there was no basis to deem call-back, let alone reorigination, illegal under U.S. law.

3. Other Tortious Interference Defenses

The defendants also support the entry of summary judgment in their favor on a number of alternative legal grounds, including federal preemption, the terms of MCI's tariff, Texas tortious interference doctrine, and privilege.

(a) Privilege

First, the defendants assert that they are protected by the common law defense of privilege. The Texas Supreme Court has explained this defense thus:

> Under the defense of legal justification or excuse, one is privileged to interfere with another's contractual relations (1) if it is done in

> a bona fide exercise of his own rights, or (2) if he has an equal or superior right in the subject matter to that of the other party. One may be privileged to assert a claim even though that claim may be doubtful, so long as it asserted a colorable legal right. However, the defense of legal justification or excuse only protects good faith assertions of legal rights.

Victoria Bank & Trust v. Brady, 811 S.W.2d 931, 939-40 (Tex. 1991).

The Restatement, cited as authority in Victoria Bank, explains that the defense "protects the actor only when (1) he has a legally protected interest, and (2) in good faith asserts or threatens to protect it, and (3) the threat is to protect it by appropriate means." Restatement (Second) of Torts § 773.

MCI did have a legal right to halt MCI's service with ATI if Telmex threatened to cut off MCI's service. That right was based on the MCI's contract with ATI. But ATI's tortious interference claim is not based on MCI halting ATI's service; it is based on MCI giving away ATI's confidential information. As such, ATI's claims concern actions which cannot be traced to legal rights stemming from a contract or domestic or foreign law. If MCI "disclose[d] the business or application(s) of [its] customers," it was in violation of U.S. law, according to MCI's correspondence with Telmex.[4] MCI maintains that it was trying to protect its interest in its contract with Telmex, and

---

[4] Neither side cites the regulation that such disclosure violates; however, no party disputes that such disclosure is illegal without permission.

to ensure that AT&T was not receiving illegal preferential treatment from Telmex. The problem with MCI's argument is that the tortious interference was allegedly accomplished through improper release of confidential information. Release of nonconfidential information may be a basis for privilege. *See* Restatement (Second) of Torts § 773 illus. 1. The release of confidential information, however, is not an "appropriate means" to protect other interests.

If *Telmex* cut off ATI's service as alleged, it might have been against Mexican law, but whether or not it was, Telmex's privilege is not before us, except insofar as SBC attempts to claim it by virtue of SBC's part ownership of Telmex. SBC maintains that it was protecting the interests of its affiliated company Telmex. However, SBC is only a 10% owner of Telmex and there is evidence which a factfinder could find that SBC's actions in helping Telmex and MCI shut down ATI were as much for SBC's benefit as its own entity rather than as an agent of Telmex, given that SBC intended to independently enter ATI's market. Because there is not a completely obvious "unity of interest" between SBC and Telmex, summary judgment on SBC's privilege defense is inappropriate. Thus, there is no basis on which to rest a defense of privilege for SBC and MCI at the summary judgment stage.

(b) Preemption

MCI argues that its filed tariff preempts ATI's Texas tort claims because of the federal "filed-rate doctrine." Many cases speak about federal preemption of state claims when there are filed tariffs. *See e.g., Marcus v.*

AT&T Corp., 938 F.Supp. 1158 (S.D.N.Y. Aug. 21, 1996), *aff'd*, 138 F.3d 46 (2d Cir. 1998) (holding the following claims preempted: deceptive acts and practices, false advertising, fraud and deceit, negligent misrepresentation, breach of warranty, and unjust enrichment by failing to disclose that customers were billed per minute rounded up to the next higher full minute for long distance services). The leading and controlling case in this area for our purposes is *AT&T v. Central Office Telephone, Inc.*, 118 S.Ct. 1956 (1998), in which the Supreme Court expounded on the filed-rate doctrine.

Central Telephone, a bulk reseller of long distance services purchased from AT&T, sued AT&T, alleging breach-of-contract and tortious interference claims. Under the filed-rate doctrine, federal law preempts claims concerning the price at which service is to be offered, and the Supreme Court ruled that it also preempts claims concerning the services that are offered. *See id.* at 1962-64. The Court thus found the breach-of-contract claims preempted. The Court also found the tortious interference claim preempted, but only because that claim was "wholly derivative of the contract claim for additional and better services." *Id.* at 1964. The tortious interference claim alleged that AT&T's refusal to provide certain types of service led to interference of Central Telephone's contracts with its customers. *See id.* at 1964-65. It was thus not protected by the saving clause of the Communications Act. *See id.* at 1965 ("A claim for services that constitute unlawful preferences or that directly conflict with the tariff – the basis for both the tort and contract claims here – cannot be 'saved' under § 414.").

ATI's tortious interference claims are different. It does not allege that MCI stopped providing service, resulting in ATI being unable to meet customer demand. Rather, ATI alleges that MCI released confidential information, first to Telmex and then to AT&T. This information ultimately led those parties to deny service to ATI. This claim is not derivative of a contract claim. It does not concern the provision of services which are covered by the filed tariff, but rather it concerns illegal actions outside the scope of the tariff and not derivative of any phone services. Therefore, the filed rate doctrine does not preempt ATI's tortious interference claims.

(c) Filed Tariff

MCI argues that its filed tariff precludes liability because there is a contractual provision stating that MCI may halt service if a situation arose involving threats from the third party partner. This only goes to whether MCI breached its contract with ATI, not whether MCI breached duties imposed outside of the contract, as alleged by ATI, and thus this argument fails as a defense to tortious interference. The right to halt one contract does not grant the right to interfere with another by any conceivable means. MCI may well have been entitled to cut off service to ATI once Telmex threatened it with cutting off international 800 service. But the provision did not authorize MCI to respond to such threats by helping Telmex cut off ATI, or by preventing ATI from having a contractual relationship with AT&T.

(d) Breach of Contract

MCI argues that ATI's tortious interference claims are nothing more than claims that MCI breached its contract with ATI, and as such are precluded from serving as the basis of tortious interference claims. Under Texas law, "the general law is that where a defendant's conduct breaches an agreement between the parties and does not breach an affirmative duty imposed outside the contract, the plaintiff ordinarily may not recover on a tort claim if the damages are economic losses to the subject matter of the contract." *National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc.*, 18 F.3d 323, 327 (5th Cir. 1994). However, this does not mean tort damages cannot be measured by economic losses from the contract. *See American National Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274 (Tex.1990) (allowing recovery for exemplary damages for tortious interference claim when damages from the tort were the same as economic damages from breach of contract). Furthermore, it is obvious that ATI's claims are not breach of contract claims, but rather are allegations that MCI breached duties imposed affirmatively outside the context of the ATI-MCI contracts. Thus, this defense fails as well.

(e) No Issue of Material Fact

Finally, MCI argues that there is no evidence that MCI actually gave ATI's numbers to Telmex. There is at least a material issue as to this fact, however, and summary judgment is inappropriate. The fact that MCI and MCI's employees say they did not give away the numbers

flies square in the face of the memoranda and communications discovered by ATI which suggest that MCI planned to and did do just that.

C. Federal and State Antitrust Claims

1. Prima Facie Showing

The district court dismissed ATI's federal and state antitrust claims because the court failed to find a relevant U.S. market. In order to support an antitrust claim, there must be actions which have a reasonably foreseeable effect in a defined U.S. market. *See* 15 U.S.C. § 6a; *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993) (allowing Sherman act recovery for foreign conduct that produces "some substantial effect in the United States").

ATI asserts that there was a direct and substantial effect on trade or commerce, and second that it was engaged in export trade. The substantial effect that ATI identifies is that its own business, as well as that of other companies, failed, "resulting in an inability to sell its U.S. telephone switching services to all Mexican customers." The alleged actions by Telmex and the other defendants were aimed at shutting down this market. It is clear that the U.S. export market for reorigination services was a definite and sizable export market, and the failure of these 80 businesses is clearly an effect on export trade from the United States. The market is significant, with ATI's annual revenues alone reaching $3 million/year at the time the events occurred. Under 15 U.S.C. § 6a, the antitrust laws do "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a

direct, substantial, and reasonably foreseeable effect . . . on trade or commerce which is not trade or commerce with foreign nations, or on import trade or . . . export trade . . . with foreign nations." By showing a significant effect on a U.S. export market, ATI meets the export trade exception.[5]

For the purposes of the antitrust inquiry, however, it matters whether the importation of these U.S. services was legal under Mexican law. If the importation of these services was illegal, there is no legal export market to Mexico. If there is no legal U.S. export market to Mexico and the only U.S. export market affected is the Mexican market, then there is no antitrust injury. *Cf. Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies."). In other words, foreign countries may make laws or create monopolies that effectively and completely exclude U.S. import competition. That does not then mean that U.S. companies can enter the market anyway and make antitrust claims when things do not work out. Even in the U.S., the existence of a legitimate government granted monopoly

---

[5] This is not to say that the factfinder could not ultimately conclude that the relevant market for antitrust liability is the Mexican long-distance market. Our characterization of Telmex's business and our determination that the actions of Telmex and the other defendants had a "direct, substantial, and reasonably foreseeable effect" on the U.S. export market for switching services does not preclude the factfinder from making an independent determination of the relevant market for the purposes of antitrust liability. *Cf. Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 311 (5th Cir. 1997).

precludes claims of antitrust violation when a plaintiff wants to compete in the regulated market. *See Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343 (5th Cir. 1980).

This is not inconsistent with our holding that contracts for reorigination services may still serve as the basis for tortious interference claims. For the purposes of antitrust law, the threshold choice of law determination always validates a foreign government's right to determine whether outsiders can compete. As we have held, however, this choice of law is not mandated by the law of tortious interference. Admittedly, this is a "conflict" within U.S. law, but not one we need to resolve.

ATI challenges the district court's award of summary judgment against it on its antitrust claims against SBC and MCI. Because we find that ATI's services were legal under the law of Mexico at the relevant time, anticompetitive means of stopping such service may violate U.S. antitrust laws.

2. Legality of ATI's Operations Under Mexican Law

The content of foreign law is a question of law and is subject to de novo review. *See* Fed. R. Civ. P. 44.1; *Perez & Compania v. M/V Mexico I*, 826 F.2d 1449 (5th Cir. 1987). "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43." Fed. R. Civ. P. 44.1. Under this rule, expert testimony accompanied by extracts from foreign legal material is the

basic method by which foreign law is determined. *Republic of Turkey v. OKS Partners*, 146 F.R.D. 24, 27 (D.Mass.1993). It is not, however, "an invariable necessity in establishing foreign law, and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." *Curtis v. Beatrice Foods Co.*, 481 F.Supp. 1275, 1285 (S.D.N.Y.), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980). Likewise, differences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact under Rule 56. *Banco de Credito Indus., S.A. v. Tesoreria General*, 990 F.2d 827, 838 (5th Cir. 1993). In general, summary judgment is appropriate to determine the content of foreign law. *See* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE CIV.2D § 2444.

At issue is the legality of ATI's business under Mexico law. Under Mexican law at the time in question, a government concession or permit was required in order to provide telecommunications services in Mexico. It is undisputed that ATI had no permit or concession from the Mexican government. What is disputed is whether ATI's business was within the scope of this law. ATI makes the argument that at the time in question, the relevant regulatory provisions envisioned the concession requirement to only apply to entities who were providers of telecommunications services in that they owned, installed, operated, and exploited telecommunications infrastructure in Mexico, with emphasis on the "and." The defendants argue that a permit is required to install, operate, "or" exploit telecommunications infrastructure

in Mexico, with emphasis on the "or," and because ATI: exploited the infrastructure, they needed a permit. The defendants also argue that all "resellers" needed permits.

ATI rests primarily on the deposition of Miguel Orrico Alarcon, who was head of SCT legal counsel for 33 years. Orrico, who is said to have drafted, applied, interpreted and enforced the provisions at issue, explained that Mexico's statutory definitions of a "provider" of telecommunications service is limited to those that install, operate, *and* exploit the network. Because ATI did not install a network, and because special significance is attached to the conjunctive language of the statute, ATI was not a provider and therefore was not regulated under these provisions. Mexican law changed subsequent to the time at issue in this case, and now resellers explicitly are required to obtain permits.

The defendants focus on Moncayo's letter and on the Secretary of Communications and Transportation's Official Circular Letter 119-1900. Moncayo's letter is of little value, because it directly discusses only "call-back" services, which ATI's was not. The Official Circular, however, condemns such services in addition to "other similar or equivalent procedures with the same purpose." The Circular concludes that such services are "rendered outside the legal provisions established by the Federal Law on Telecommunications, in view of the exclusive nature of the right granted to Telefonos de Mexico until August 1996 for rendering basic national and international long distance service."

The defendants maintain that the Official Circular is entitled to deference by this court as an agency's interpretation of the laws which it administers and enforces, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). ATI counters that the official circulars in fact have no legal effect, and that in Mexico, only federal courts have the power to issue resolutions determining the legality or illegality of acts. Moreover, ATI emphasizes, only the General Bureau of Judicial Matters has the sole power to "establish and systematize" the legal criteria concerning the application of legal and regulatory provisions, not Mr. Moncayo's office.

Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations. The Seventh Circuit reached this conclusion in deferring to an administrative agency in France, a civil law country. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes deference to the construction France places upon its domestic law. . . . Giving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency is unacceptable.").

In *Amoco Cadiz*, the court was faced with conflicting interpretations of French law. The court noted that had the litigants been private parties, it would have had to resolve the conflicts. *See id.* at 1312. Because the Republic of France was before the court, however, the Seventh Circuit accepted its interpretation of the law. *See id.* The Republic of Mexico is not a litigant before this court and neither is the SCT. And while the evidence shows that the SCT was empowered to enforce Mexican law, it does not

persuasively show that the SCT was empowered to interpret Mexican law. The fact that U.S. courts routinely give deference to U.S. agencies empowered to interpret U.S. law and U.S. courts may give deference to foreign governments before the court does not entail that U.S. courts must give deference to all agency determinations made by all foreign agencies not before the court. More importantly, the most relevant official circular at issue is dated 1996, after the new laws went into effect; thus, it is unclear whether the SCT position was that such activities were currently illegal or had always been illegal. For these reasons, we do not feel compelled to credit the SCT's determinations without analysis.

The defendants also argue that the relevant regulations required a permit to be a reseller. The statute in question, however is not without question. Our English translation of Article 75 of the Telecommunications Rulings of Mexico reads as follows:

> The exploitation of the telecommunications network given in concession must be carried out directly by its holder and its commercialization may be made through agents in accordance with the provisions approved by the Ministry.

We read this to mean that the direct operation of the network must be accomplished by the actual provider, and that the provider may designate others to commercialize the network. It does not say commercialization "must" be made through those channels, however. Furthermore, this court has not been apprised of the content of any "Ministry provisions," and the defendants have not identified any regulation in place at the time which

defines or regulates "resale" or explicitly requires a permit for anything except provision, which we have already decided ATI was not doing. Instead, we find convincing the argument that before the new laws took effect, only the direct provision of telecommunications services required a concession from the Mexican government, for several reasons.

First, because ATI's method was novel, it is unrealistic to read the older Mexican law as covering the service. The new laws explicitly regulate resale and pointedly are not retroactive; this is at least some evidence supporting the notion that permits were not previously envisioned.

Second, Mexico's concession to Telmex specifically authorized Telmex to resell any excess capacity, even before 1996, although it did not require it to do so. Thus, what appears to be the case is that Telmex resold capacity to MCI not realizing the boon it would be for others to use that capacity with additional U.S. services attached.

Third, a conclusion that any Mexican resale is covered by the older, vague provisions would entail that every U.S. or Mexican business with a toll free number would have been required to have a permit because they "resell" Mexican phone service as much as ATI did whenever they charge the cost of call-back to the caller through their service fees. The fact that laws could try to distinguish between resellers "primarily" engaged in resale versus those "incidentally" engaged in resale does not change the fact that the relevant laws are not so explicit.

Fourth, to say that any Mexican resale required a permit would have invalidated MCI's contracts with Telmex insofar as neither MCI nor Telmex has indicated that

MCI had a permit. While it is not necessary for either defendant to show its own conformity with Mexican law, it adds skepticism to their argument that a permit was required or even envisioned and lends credibility to the view that what happened in this case is that Telmex made a bad bargain with MCI and wanted to get out of it. Telmex's contract with MCI might have purported to restrict MCI's subsequent use of the lines, but ostensibly did not. Our view is further supported by the fact that the SCT did nothing to instigate enforcement proceedings against any business during the relevant time period. The evidence indicates that by law the SCT was required to institute such enforcement if there was evidence of illegality. Instead, the precatory language of even the 1993 SCT letters, stating that the SCT would be "grateful" if MCI suspended the service of its customers, suggests that even to the SCT the services in question were not clearly illegal.

Fifth, because Telmex has no legitimate interest in tying a monopoly over domestic lines to the use of lines outside of Mexico, we will not construe Mexican law as requiring a permit for the importing of U.S. switching service unless explicitly authorized. No one contends that the relevant laws are this explicit, however. Furthermore, this interpretation conforms with the FCC's extension of comity to foreign law when foreign law is unambiguous.

For all of these reasons, we find ATI's activity in Mexico to be legal during the time in question. Thus it was improper to dismiss ATI's state and federal antitrust claims against SBC and MCI. It is argued that this application of the export exception circumvents the principle

that antitrust laws do not extend to other nations' competitive rules. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 582 (1986). This would only be true if the legality of the export-import business were not taken into consideration, which it has been. The fact that we find ATI's business to be legal in Mexico is not irreconcilable with Mexican policy designed to protect Telmex from domestic competition, since such a policy is not furthered by banning the import of U.S. reorigination services. Furthermore, Mexican law could have explicitly protected Telmex from even international competition by making it illegal to import U.S. services, which would have been a basis to defeat these antitrust claims.

D. Personal Jurisdiction over Telmex

A federal district court has personal jurisdiction over a nonresident defendant to the same extent as a state court in the state in which the district court is located. *See, e.g., Bullion v. Gillespie*, 895 F.2d 213, 215 (5th Cir. 1990). The Texas long-arm statute extends to the limits of the Due Process Clause of the Constitution. *See* Tex.Civ.Prac. & Rem.Code Ann. § 17.042. The exercise of personal jurisdiction thus can be maintained if the nonresident defendant has purposefully availed itself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state, *see, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and if the exercise of jurisdiction over the nonresident defendant does not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

Telmex claims both that it did not have sufficient contacts with the forum state, and that the exercise of jurisdiction over it would be improper because the procedural and substantive policies of Mexico would be affected. *Asahi* noted that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id.* at 115 (internal quotation marks omitted). *Asahi*, however, was concerned with "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system." *Id.* at 114. For Telmex, a company that indisputably has engaged in numerous business dealings in the United States, these concerns are de minimis, and even if Mexican policy is relevant on the merits, it is not relevant to the initial determination of personal jurisdiction. If Telmex has broken U.S. law, then requiring Telmex to answer for that would be "fair play."

Thus, there was no personal jurisdiction over Telmex only if Telmex did not have sufficient contacts with Texas and the United States. Minimum contacts can be established either through contacts giving rise to general jurisdiction, or those giving rise to specific jurisdiction. We shall consider these as well as ATI's alternative claim that jurisdiction is authorized under a special provision of the Clayton Act.

1. General Jurisdiction

The lower court dismissed the claims against Telmex on personal jurisdiction without an evidentiary hearing. In such instances, the plaintiff satisfies his burden by presenting a prima facie showing of jurisdiction. *See Felch*

v. Transportes Lar-Mex, SA De CV, 92 F.3d 320, 326 (5th Cir. 1996). Conflicting evidence must be resolved in favor of the plaintiff. *See id.* (quoting *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990)).

General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed. *See Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir. 1996). Telmex's contacts with Texas over the time period from 1990 to 1996 were numerous; the major ones are highlighted here. Up until 1990, Telmex leased telephone circuits between Arizona and Texas. Telmex's current lines interconnect with Texas at the border in McAllen and El Paso. Telmex leased real property in Texas in 1995 and paid taxes to Texas that same year. Telmex contracted to warehouse 75,000 telephone poles in Laredo around 1990-1991. Telmex had correspondent agreements with a number of U.S. carriers. Settlement revenues from these agreements totaled approximately $1 billion a year in 1994-1995. The total revenues derived from Texas residents totaled millions of dollars a month. Telmex also solicited ads for yellow page ads in border cities of U.S., although it is unclear exactly where. Additionally, SBC is alleged to be a Texas contact of Telmex, since SBC owns a portion of a controlling interest in Telmex and thus exerts some control over Telmex.[6]

---

[6] A number of other contacts are also put forward, mostly involving Telmex paying for services that were provided by corporations in Texas or the U.S. Such services included consulting and finance services. To the degree these contacts

The district court examined each Telmex contact and in isolation from the others, rather than examining the contacts "in toto" as required. *See Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986). In other words, even if a number of different contacts are independent of one another, if they occur with such frequency that the contacts in general are "continuous and systematic," there is general jurisdiction.

The question, then, is whether Telmex's contacts with Texas demonstrate a business presence in Texas sufficient to confer general jurisdiction. The mere renting or ownership of property in a forum is not enough when that property is not used to conduct business in the forum. *Cf. Shaffer v. Heitner*, 433 U.S. 186 (1977). And while Telmex's other contacts may be continuous and systematic contacts which constitute doing business *with* Texas, Telmex has virtually no contacts which constitute doing business *in* Texas. Primarily, Telmex interconnects its Mexican lines with American lines, enabling long distance communication. The money U.S. companies pay Telmex is for service on the Mexican leg of the call; the money the U.S. carriers receive is for the U.S. leg of a call. As such, Mexican and U.S. telecommunications companies do business *with* each other in these situations, but neither is doing business *in* the other country for jurisdictional purposes.

---

involve Texas, they add little to the issue; to the degree they are with other states, they are irrelevant at this juncture. Other contacts, such as Telmex being listed on the NYSE, or designating a N.Y. agent for service of process are also not very informative.

The lines Telmex leased from Texas to Arizona also were for the purpose of connecting two points in Mexico and do not constitute doing business in Texas. The fact that SBC owns a portion of a controlling interest in Telmex also adds little to the mix. SBC's 10% interest is not a controlling interest, and typically, the corporate independence of companies defeats the assertion of jurisdiction over one by using contacts with the other. *See Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983) ("Generally, our cases demand proof of control by the parent over the internal business operations and affairs of the subsidiary in order to fuse the two for jurisdictional purposes.").

The one contact that could constitute doing business in Texas would be the yellow page ads. However, the evidence on the yellow page ads consists of nothing more than a comment that Telmex solicited yellow page ads in border cities in the U.S. without naming which cities, when this occurred, whether such ads actually were actually placed, or for how long. Without more, such evidence does not help establish continuous and systematic contacts.

It is alleged that MCI sells regular phone service, international 800 service, and private line service for Telmex in Texas. This would imply a principal/agent relationship from which jurisdiction might arise. There is no evidence, however, that the provision of service by MCI was on behalf of Telmex but instead it appears to be in the nature of the resale of capacity in Mexico by MCI and the independent provision of capacity in the U.S. by MCI, as explained above with respect to the general interconnection agreements.

The strongest argument for general jurisdiction is that Telmex had arrangements with American carriers to accept telephone signals from Texas, and in order to serve this purpose, Telmex's telecommunications lines crossed into Texas, terminating across the border. The termination of Telmex's telephone lines in Texas allows for continuous and systematic transfer of calls. However, despite the apparent force of the argument that such a contact demonstrates a presence in Texas for business purposes, we are bound by *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491 (5th Cir. 1989), in which such interconnections, even though crossing the border into a forum, were held insufficient to confer general jurisdiction under the Due Process Clause.

In sum, the totality of the contacts suggests that Telmex conducted a great deal of business with Texas, but virtually none in Texas, as such general jurisdiction cannot be shown, even on a prima facie basis.

2. Clayton Act Jurisdiction

Because we find that ATI has shown potential U.S. antitrust injury, jurisdiction over Telmex may be obtainable based on nationwide contacts rather than just Texas contacts under the jurisdictional provision of the Clayton Act, 15 U.S.C. § 22. This provision allows for jurisdiction over any federal antitrust suit in any district in which a defendant transacts business, and provides that "all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." When jurisdiction is invoked under the Clayton Act, the court examines the defendant's contacts with the United States

as a whole to determine whether the requirements of due process have been met. *See Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406 (9th Cir. 1989).

However, while there may be some additional evidence of Telmex doing business *with* the U.S., there is no evidence qualitatively difference on the subject of doing business *in* the U.S. for what we deem to be a relevant time period from 1990 to 1996. Thus, Clayton Act personal jurisdiction over the antitrust claims is also unavailable.

3. Specific Jurisdiction

ATI maintains that specific jurisdiction over Telmex arises because Telmex "purposefully directed its activities to residents of Texas (ATI and over 80 other resellers)." As ATI recognizes, specific jurisdiction over a nonresident exists when the defendant "purposefully avails" itself of the privilege of conducting activities in the forum, and the plaintiff's cause of action arises out of or relates to that act. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). By working through SBC and MCI to obtain the numbers of resellers, ATI maintains, Telmex purposefully availed itself of the forum.

While Telmex did not conduct much business in Texas, it conducted a high volume of business with Texas and Texas corporations. It was this business with which Telmex was concerned when Telmex allegedly canceled ATI's numbers. Such actions, if done without a legal right, may amount to violation of U.S. law. The issue of whether they were legally privileged, however, is not before us, and such a defense would not defeat personal

jurisdiction. Thus, if the allegations against Telmex are true, then Telmex may have violated U.S. antitrust law by harming a Texas business through the willful cancellation of a necessary portion of that business's service. Such actions would have reasonably foreseeable consequences in Texas.

It is no use to say that ATI's location in Texas was "fortuitous." ATI had to be located somewhere and Telmex knew where that was and directed its actions toward Texas by canceling phone service linked to Texas. Telmex's lines ran right up and into Texas for the express purpose of serving Texas residents with Mexican phone service, a service which it received millions of dollars a month in revenue. The allegation that Telmex shut down these lines in order to harm a Texas business whose services were legal in Mexico suffices to confer personal jurisdiction over Telmex for the injuries suffered in Texas. The equivalent result would hold if an electric company sent an electric spike through its lines, damaging computers on the other end, even if that company's lines did not carry the spike all of the way to its destination.

By conducting a large volume of business with Texas through contracts carefully drafted to avoid subjecting Telmex to general personal jurisdiction in Texas, Telmex may have avoided doing business in Texas, but it made sufficient contacts with Texas and received sufficient benefits that personal jurisdiction in Texas is proper to answer for the consequences of the actions it allegedly took, directed toward Texas, to protect its business with Texas.

E. Discovery

ATI complains discovery was improperly limited. The district court stayed discovery on everything except jurisdictional issues and never lifted the stay. ATI contends that it was reversible error for the district court to grant summary judgment for SBC and MCI on all of ATI's causes of action without allowing discovery on substantive issues.

ATI points to SBC's assertion of the *Copperweld* doctrine, which requires a factual determination as to whether a monopolistic conspiracy occurred between economic competitors. This doctrine was asserted for the first time in SBC's motion for summary judgment. ATI complains that it was unable to investigate the relationship between SBC and Telmex for the purpose of this doctrine. ATI also complains it was unable to investigate the anticompetitive effect in the United States of the defendants' conduct. In particular, ATI points to the fact that the district court ruled against ATI on the issue of relevant market, without affording ATI the opportunity to pursue the issue through discovery. The issue of relevant market is a fact question. *See, e.g., C. G. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241 (5th Cir. 1985); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984).

ATI has waived the issue of inadequate discovery with respect to SBC. Under Federal Rule of Civil Procedure 56(f), the appropriate way to raise the issue is for the party opposing the motion for summary judgment to file a motion for a continuance with an attached affidavit stating why the party cannot present by affidavit facts

essential to justify the party's opposition. ATI did not do this with respect to SBC.

MCI made such a motion, but the district court denied it. To obtain a continuance of a motion for summary judgment, a party must "specifically explain both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance would enable the party to present such evidence." *Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.*, 48 F.3d 927, 930 (5th Cir. 1995). The non-moving party may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts in opposition to summary judgment. *See Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995). If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment. *See Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 278 (5th Cir. 1991).

ATI failed to specify its intended discovery or how such discovery would assist it in opposing summary judgment in favor of MCI. ATI failed to identify who could provide information relevant to the issues other than witnesses who had already been deposed one or more times before.

When a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). ATI, however, has not persuasively indicated that it was deprived of any relevant information with respect to MCI. *Cf. RTC v. Marshall*, 939 F.2d 274, 278 (5th Cir.

1991) (requiring the nonmovant to show how additional discovery would lead to unresolved issues of fact). For these reasons, it was proper for the district court to deny additional discovery.

IV.

For the forgoing reasons, we REVERSE the district court's grant of summary judgment to MCI and SBC on the substantive issues in this case, we REVERSE the dismissal of Telmex on personal jurisdiction, and we REVERSE the denial of partial summary judgment to ATI on the issue of the lawfulness of its activities in Mexico. We REMAND this case to the district court for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50881

D.C. Docket No. SA-96-CV-1064

ACCESS TELECOM, INC

Plaintiff - Appellant

v.

MCI TELECOMMUNICATIONS CORPORATION;
MCI INTERNATIONAL, INC; SBC COMMUNICATIONS,
INC; SBC INTERNATIONAL, INC;
SBC INTERNATIONAL LATIN AMERICA;
TELEFONOS DE MEXICO

Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas, San Antonio.

Before REYNALDO G. GARZA, HIGGINBOTHAM, and DAVIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ACCESS TELECOM, INC., Plaintiff, V. MCI TELECOMMUNICATIONS, INC., et al., Defendants.	§ § § § § § § § §	CIVIL NO. SA-96-CA-1064

ORDER

(Filed Aug. 5, 1998)

The matter before the Court is the Motion for Summary Judgment filed by defendants MCI Telecommunications Corporation and MCI International, Inc. ("MCI") on July 29, 1997,[1] Plaintiff's Response filed on August 12, 1997,[2] ATI's Supplement to Plaintiff's Motion for Summary Judgment and Response to Defendant MCI Telecommunication Corporation's and MCI International, Inc.'s Motion for Summary Judgment filed on August 13, 1997[3] and Supplement to Plaintiff's Response to the Motion for Summary Judgment of MCI filed on August 21, 1997,[4] MCI's reply to ATI's response filed on August 26, 1997,[5] the letter brief submitted by MCI on June 29,

---

[1] Docket Entry No. 80.

[2] Docket Entry No. 92.

[3] Docket Entry No. 94.

[4] Docket Entry No. 96.

[5] Docket Entry No. 107.

1998, and the letter in response submitted by ATI on July 2, 1998. Having reviewed these documents, the supporting exhibits and affidavits attached thereto and the relevant case law, the Court enters the following order.

I. FACTUAL BACKGROUND

ATI began operating in June 1993. One of the businesses it engaged in was the reorigination of international long distance calls from its customers in Mexico to parties located in the United States at rates cheaper than the customer would pay if it used the long distance services of Telefonos de Mexico ("Telmex"). MCI is a provider of interstate and international telecommunications services to both commercial and residential users. On June 30, 1993, ATI executed a letter of authorization selecting MCI as its long distance carrier and provider of 800 numbers. On July 7, 1993, ATI executed an MCI Global Vision Enrollment Form and Agreement. On November 30, 1993, ATI executed an MCI Global Vision Enrollment Form replacing the July 7, 1993 agreement. The November 30, 1993 enrollment form incorporated by reference the terms and conditions of MCI Tariff FCC No. 1 ("the Tariff"). On August 6, 1994, ATI executed an MCI Vision VIP Enrollment Form and Agreement replacing the November 30, 1993 Agreement. The August 6, 1994 Enrollment Agreement also incorporated by reference the Tariff. MCI International ("MCI") is a participating carrier under the Tariff. Beginning in July 1994, Telmex began terminating ATI's 1-800 services, claiming that ATI's 1-800 service was in violation of Mexican law.

ATI filed the instant lawsuit against MCI and the other defendants in the 734th Judicial District Court, Bexar County, Texas. ATI alleges the following seven causes of action against MCI: (1) breach of contract; (2) negligent misrepresentation; (3) promissory estoppel; (4) tortious interference with contract; (5) tortious interference with prospective relations; (6) violation of the Texas Antitrust Act; and (7) violation of the Sherman Act. MCI now moves for summary judgment on a variety of grounds.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Federal Rules of Civil Procedure 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 319, 322, 106 S.Ct. 2548, 2551, 91 L.Ed.2d 268 (1985); *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987). The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 *1986); *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 588 (5th Cir. 1995). A fact is "material" if its resolution in favor of one party might affect the outcome of the action under governing law. *Anderson v. Liberty Lobby*, 477 U.S. 252, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). No genuine issue of material fact exists if a rational trier of fact could not find for the nonmoving party based on the evidence presented.

National Ass'n of Gov't Employees v. City Pub. Serv. Bd., 40 F.3d 698, 712 (5th Cir. 1994).

To withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with evidence to support the essential elements of its claim. *Id.* (citing *Celotex Corp.*, 477 U.S. at 321-323). "[A] complete failure of proof concerning an essential element of the nonmoving party's cases renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323.

The Court must consider all evidence in the light most favorable to the nonmoving party. *National Ass'n of Gov't Employees*, 40 F.3d at 712-713. "Conclusory allegations unsupported by specific facts, however, will not prevent the award of summary judgment. . . . " *Id.* at 713 (quoting *Anderson*, 477 U.S. at 249).

Thus, summary judgment is appropriate when, in the absence of factual disputes, one or more of the essential elements of a claim or defense before the court is not in doubt and judgment may be entered on the basis of purely legal considerations. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). As stated by the Supreme Court in *Celotex*, "[t]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . . " 477 U.S. at 323, 106 S.Ct. at 2552 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)). Therefore, by its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of

material fact. 477 U.S. at 247-248, 106 S.Ct. at 2510 (emphasis in original).

With regard to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id.*

Finally, with regard to the role of the trial court in reviewing a motion for summary judgment and the evidence offered in support thereof, it is well settled that the Court's only function is to ascertain whether there is an issue of material fact to be tried. A trial court is not at liberty to decide any factual issues it finds in the records or to make credibility determinations. As explained by the Supreme Court:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson, 477 U.S. at 255, 106 S.Ct. at 2513. In other words, a judge assessing the "persuasiveness" of evidence presented on a motion for summary judgment may discount such evidence as unspecific or immaterial, but not as unbelievable. *Leonard v. Dixie Well Service & Supply, Inc.,* 828 F.2d 291, 294 (5th Cir. 1987).

Utilizing these standards, the Court scrutinizes ATI's claims as to their susceptibility to MCI's motion for summary judgment.

III. ATI'S STATE LAW CLAIMS: PREEMPTED BY THE FEDERAL COMMUNICATIONS ACT?

MCI first moves for summary judgment as to ATI's state statutory and common law claims on the ground that they are preempted by the Federal Communications Act, 47 U.S.C. §§ 151-613 ("FCA"). ATI takes the position that its claims are preserved by the savings clause contained in the FCA.

The preemption doctrine is derived from the Supremacy Clause in the United States Constitution which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, state laws which " 'interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 604, 111 S.Ct. 2476, 2481, 115 L.Ed.2d 532 (1991) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1,21, 6 L.Ed. 23 (1824)).

The primary inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. *See Allis-Chalmers Corp v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904, 1909-10, 85 L.Ed.2d 206 (1985); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). Congressional intent

may be expressly stated in the language of the statute, or may be implied by the structure and purpose of the statute. *See Cipollone*, 506 U.S. at 517, 112 S.Ct. at 2617. Absent an express congressional statement, state law may be preempted in two situations; first, if the state law actually conflicts with federal law, *see id; Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983); or, second, if federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Cipollone*, 505 U.S. at 517, 112 S.Ct. at 2617 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.1447 (1947)).

In the instant case, MCI argues that the comprehensive regulatory scheme of the Communications Act evidences Congress' intent to preempt the entire field. The express purpose of the Communications Act is to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (1988). To effectuate that end, the Act governs "all interstate . . . communications by wire or radio and . . . all persons engaged within the United States in such communication," 47 U.S.C. § 152(a), and provides that an interstate telephone carrier's "charges, practices, classifications, and regulations for and in connection with [its] communications service, shall be just and reasonable," 47 U.S.C. § 201(b).

In support of its preemption argument, MCI cites the Court primarily to *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968). In *Ivy*, the plaintiff alleged grossly negligent and unreasonably delayed installation of telephone lines and grossly negligent operation of the lines, and claimed that federal jurisdiction existed under the Communications Act. The district court dismissed the complaint for lack of subject matter jurisdiction, finding that the claims of negligence and breach of contract did not arise out of the Communications Act, but rather out of state tort and contract law. On appeal, the Second Circuit reversed and remanded, holding that although the plaintiff's claims were not governed by the Communications Act, such claims were governed by federal common law emanating from the Communications Act. Based on its review of several Supreme Court cases, the Second Circuit concluded that "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and . . . the states are precluded from acting in this area." *Ivy*, 391 F.2d at 491. Citing this language, MCI contends that ATI's state law claims, because they relate to communications services, are preempted by the Communications Act. As explained below, MCI's argument fails.

As pointed out by ATI in its response, many cases decided after *Ivy* have found that state law claims such as those asserted by ATI in this case are not barred, but have been preserved by the "savings clause" of the Communications Act. For example, in *Cooperative Communications, Inc. v. AT&T*, 867 F.Supp. 1511 (D.Utah 1994), CCI, the

plaintiff, an aggregator telecommunications company,[6] brought state law claims against AT&T for intentional interference with prospective economic relations, interference with contract, business disparagement, breach of covenant of good faith and fair dealing, unfair competition, violation of the Utah Uniform Trade Secrets Act, and violation of the Federal Communications Act. AT&T, relying on *Ivy*, moved for dismissal of the state claims on the ground that they were preempted by the Communications Act. The district court denied the motion, explaining:

> The court in *Ivy* did not address the "savings clause" of the Communications Act, set forth at section 414. The savings clause provides:
>
> > § 414 Exclusiveness of Chapter
> >
> > Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.
>
> 47 U.S.C. § 414. At issue, then, is whether savings clause preserves CCI's state causes of action against AT&T.
>
> Courts in other jurisdictions have held that the savings clause preserves causes of action for

---

[6] As an aggregator company, CCI purchased large quantities of long distance communication services from AT&T at discount rates which it then sold to persons or entities using smaller amounts of long distance service at a price lower than they could have obtained from AT&T directly.

breach of duties distinguishable from those created under the Act. For example, in *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 98 Ill.Dec. 24, 493 N.E.2d 1045, *cert. denied*, 479 U.S. 949, 107 S.Ct. 434, 93 L.Ed.2d 384 (1986), the Illinois Supreme Court ruled that "state law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414." *Id.*, 98 Ill.Dec. at 30, 493 N.E.2d at 1051. In *Kellerman*, the plaintiffs brought state law claims of fraud and deceptive advertising against MCI, a provider of long-distance telephone service. MCI argued that the claims were preempted by the Communications Act, relying, in part, on *Ivy*. The *Kellerman* court rejected that argument, and in reviewing the holding of *Ivy*, as well as the language of the savings clause, stated:

> [W]e believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the act." State-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Id. (quoting *Puerto Rico Telephone Co. v. F.C.C.*, 553 F.2d 694, 708 (1st Cir. 1977)).

Similarly, in *Bruss Co. v. Allnet Communications Services*, 606 F.Supp. 401 (N.D.Ill. 1985), the

court held that section 414 preserved the common law claims of the plaintiffs. The plaintiffs had sued Allnet, a provider of long-distance telephone services, alleging common law fraud and violations of Illinois' deceptive trade and consumer fraud acts. The court found that the duties owed by the defendants under the common law causes of action were different from those duties created by the Communications Act. The court stated:

> None of these causes of action conflicts with the provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress. The Court therefore concludes that § 414 applies to preserve these causes of action.

Id. at 411. *See also, Financial Planning Inst., Inc. v. American Tel. & Tel. Co.*, 788 F.Supp. 75 (D.Mass. 1992). The *Financial Planning* court clarified the intended function of the savings clause:

> Not only did Congress not express an intent to provide for an exclusive federal remedy for a breach of contract for telecommunications services, but by enacting the savings clause, Congress specifically provided for the preservation of existing statutory and common law claims in addition to federal causes of action.

Id. at 77.

In the instant case, six of CCI's claims are based on state common law or state statutory grounds; intentional interference with prospective economic relations; interference with contract; business disparagement; breach of the covenant of good faith and fair dealing; unfair

competition; and violation of the Utah Uniform Trade Secrets Act. CCI contends that these claims exist as separate cause of action, and were not created by the Communications Act. AT&T has not cited to any specific sections of the Communications Act which conflict with CCI's state law claims. Additionally, AT&T's contention that these claims are preempted ignores the purpose underlying section 414. In enacting the Communications Act, it is manifest that Congress intended to occupy the field of telecommunications, in order to make available to all people of the United States a rapid, efficient reasonably-priced communications service, governed by one uniform regulatory scheme. However, inclusion of the savings clause clearly indicates Congress' intent that independent state law cause of action, such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action. Hence, while some state law claims may relate to providers of telecommunications service, but nevertheless stand as independent claims not arising under the Communications Act.

Based on the foregoing, this Court holds that section 414 of the Federal Communications Act preserves CCI's state law claims.

867 F.Supp. 1515-1516.

Similarly in *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir. 1987), the Sixth Circuit found that the district court erred in denying the plaintiffs' motion to remand on the ground that their state law claims for deceit and fraud, based on the defendant long distance telephone service provider's failure to notify

them of the practice of charging for uncompleted calls, were preempted by the Communications Act. According to the Sixth Circuit, those claims, unlike those based on § 201 of the Act, do not require agency expertise for their treatment and are "within the conventional experience of judges." 831 F.2d at 633. Moreover, the alleged torts involved in its case, which involved a failure by the defendants to notify customers of a practice, were not like those involved in *Ivy*, which involved the level of service provided by the defendants. Finally, the Sixth Circuit noted, the savings clause of the Communications Act was virtually identical to that of the savings clause before the Supreme Court in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976), a case in which the Supreme Court found that the common-law action for fraudulent misrepresentation and the Aviation Act, not being " 'absolutely inconsistent,' " could coexist, "as contemplated by § 1106 [the saving clause of the Aviation Act]." 831 F.2d at 634 (quoting *Nader*, 426 U.S. at 300, 96 S.Ct. at 1985).

This Court finds that the reasoning of *Cooperative Communications, Inc.* and *In re Long Distance Telecommunications Litigation* applies in the instant case. ATI's state law claims do not involve the level of service provided by MCI. Rather, they concern alleged acts of misrepresentations by MCI to induce ATI to enter into the contract and subsequent intentional torts by MCI to eliminate ATI from the I-800 market in Mexico. Therefore, based on *Cooperative Communications, Inc.* and *In re Long Distance Telecommunications Litigation* and the reasoning contained therein, the Court finds that ATI's state law claims are

preserved by the savings clause of the Communications Act.

IV. THE FILED TARIFF DOCTRINE

MCI also argues that it is entitled to summary judgment as to ATI's state law claims on the ground that they are barred by the so-called filed tariff doctrine. The Court finds that MCI is correct only to the extent that ATI attempts to assert a claim against it for failing to provide the I-800 service after Telmex disconnected it.

The MCI Tariff provides that MCI 800 Service International Call Coverage may not be acquired and used for resale in foreign jurisdictions where MCI's PTT partners either have blocked or interrupted MCI 800 or have threatened to do so, because of the resale activities being conducted within that country by MCI customers.[7] MCI's Tariff also provides that MCI is not liable for any act or omission of any other company or companies furnishing a portion of this service.[8] Finally, MCI's Tariff prohibits use of MCI's service for any unlawful purpose.[9]

The Court has previously determined that ATI's resale of the I-800 service to Mexican customers without a

---

[7] *See* MCI's Tariff, Section C, para. 3.0862 n. 2. MCI's Tariff is attached to the Affidavit of James E. Kerr, labeled as Tab D, in the Appendix to MCI's Motion for Summary Judgment (Docket Entry No. 80).

[8] *See* MCI's Tariff, Section B, para. 4.04, 17th revised page 11.

[9] *See* MCI's Tariff, Section B, para. 6.061, 6th revised page 12.2.2.

concession from the SCT was unlawful under Mexican law. Furthermore, by ATI's own admission, it was Telmex who terminated ATI's I-800 service. Therefore, the above-cited provisions of MCI's Tariff apply to bar any attempt by ATI to hold MCI liable under a breach of contract claim for failing to provide the I-800 service after its disconnection by Telmex. However as to ATI's claim that MCI conspired with Telmex and SBC to interfere with its attempt to contract with AT&T for the I-800, the Court finds for reasons set out below, that the filed-tariff doctrine does not apply.

Section 203 of the Communications Act requires common carriers to file with the Federal Communications Commission a listing of the terms and conditions under which they will provide services to their customers. This listing, called a tariff, also sets forth the charges, classifications, practices and regulations for that particular tariff. *MCI Telecommunications v. Best Telephone Co.*, 898 F.Supp. 868, 872 (S.D.Fla. 1994). Once filed, the tariff exclusively controls the rights and liabilities of the parties as a matter of law. *Id.* (citation omitted). Because the tariff is filed, customers are presumed to have constructive knowledge of the rates governing their telecommunications service. *Marcus v. AT&T Corp.*, 938 F.Supp 1158, 1159 (S.D.N.Y. 1996) (citing *Kansas City S.R. Co. v. Carl*, 227 U.S. 639, 653, 33 S.Ct. 391, 395, 57 L.Ed. 683 (1913)). Consequently any privately negotiated rates that depart from the filed rate are superseded. 47 U.S.C. § 203(c); *Armour Packing Co. v. United States*, 209 U.S. 56, 81, 28 S.Ct. 428, 435, 52 L.Ed. 681 (1908). This doctrine, commonly referred to as the "filed rate doctrine," bars suits against regulated utilities grounded on the allegation that the

rates charged by the utility are unreasonable. *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). The filed rate doctrine prevents an aggrieved customer from enforcing contract rights that contravene governing tariff provisions or from asserting estoppel against the carrier. *Pay Phone Concepts, Inc. v. MCI Telecommunications Corp.*, 904 F.Supp. 1202, 1207 (D.Kan. 1995).

The purpose of the filed rate doctrine is two-fold. First the Supreme Court has long-held that the reasonableness of rates in a regulated industry is a question solely for the governing regulatory body. *See Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). Second, it prevents utilities from discriminating in the prices they charge for the same service among different ratepayers. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). Thus, non-justiciability and anti-discrimination are the core purposes of the doctrine. *Fax Telecommunicaciones v. AT&T*, 952 F.Supp. 946, 951 (E.D.N.Y. 1996).

In *CCI, supra*, AT&T argued, like MCI does here, that the plaintiff's state law claims were barred by the filed tariff doctrine. The district court rejected the argument, observing:

> In the instant case, AT&T points out that section 203 of the Act requires filing of tariffs not only as to the rates to be charged, but also with regard to the classifications, regulations, and practices affecting such charges. AT&T asserts that CCI's claims pertain to AT&T's business practices in providing telecommunications services, and therefore, inasmuch as CCI's

> claims against AT&T are based upon the alleged misrepresentations by AT&T regarding its rates, practices, or services, those claims are barred by the filed tariff doctrine. This Court declines to read the word "practices" so broadly. AT&T has cited no case law in support of such a reading.
>
> Additionally, CCI is quick to point to a major difference between typical filed-tariff cases and the case at bar. Unlike the plaintiff in *Marco*, who was attempting to enforce a contract containing rates below the tariff rates, CCI is not seeking to enforce AT&T's alleged misrepresentations. Rather, CCI claims that AT&T made fraudulent representations to CCI's customers regarding the rates that CCI would charge and the dealings between AT&T and CCI. CCI is seeking damages for intentional interference with prospective economic relations and business disparagement resulting from those alleged misrepresentations. Allowing CCI to proceed with its state law claims will not result in discrimination against other AT&T customers in favor of CCI. Therefore, this Court holds that the filed tariff doctrine does not act to bar CCI's state law claims against AT&T.

867 F.Supp. at 1518-1519.

The same reasoning applies in the case at bar. ATI's claims in no way concern the rates charged by MCI. Likewise, ATI does not seek to enforce any alleged misrepresentations by MCI concerning rates. Rather, ATI is seeking damages for MCI's alleged intentional misrepresentations during the negotiation of the contract and the intentional interference by MCI with its business relations by its termination of the I-800 service and by its

conspiring with Telmex and the other defendants to prevent ATI from obtaining the I-800 service from AT&T.

Moreover, MCI's Tariff FCC No. 1 specifically provides that "MCI's liability for willful misconduct, if established as a result of judicial or administrative proceedings, is not limited by this tariff."[10] In *Fax Telecommunicaciones*, the district court rejected AT&T's argument that similar language[11] in its filed tariff did not establish a separate cause of action for willful misconduct, but rather merely modified the tariff's limitation of liability in certain narrow circumstances, noting:

> AT&T's argument . . . places the exception before the rule. First, although the Court agrees that the entire liability provisions of the tariff must be read as a whole, the more reasonable reading of the provision is that AT&T's liability for willful misconduct is limited only when a dispute relates to the installation, maintenance,

---

[10] *See* MCI's Tariff F.C.C. No. 1, Section B, para. 4.02, 13th Revised page 10. MCI's Tariff F.C.C. No. 1 is attached to the Affidavit of James E. Kerr, labeled as Tab D in the Appendix to MCI's Motion for Summary Judgment (Docket Entry No. 80).

[11] AT&T's tariff provided in pertinent part that:

> The Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a Customer or by any others, for damages associated with the installation, provision, termination, maintenance, repair or restoration of [long-distance service] . . . the Company's liability, if any, shall not exceed an amount equal to the initial period charge provided for under this tariff.

> provision or repair of service. In claims unrelated to these specific instances, AT&T is liable for willful misconduct.

952 F.Supp. at 955.

A case more directly on point is *MCI Telecommunications Corp. v. TCI Mail, Inc.*, 772 F.Supp. 64 (D.R.I. 1991). In *TCI Mail*, MCI brought suit against TCI to recover a deficiency in payment for telecommunications services provided to TCI. TCI filed a counterclaim in which it alleged that, before agreeing to provide the service, MCI had represented that it would charge a much lower rate than the rate it ultimately charged. TCI claimed that it had an oral agreement with MCI, and that MCI breached the contract and committed tortious misrepresentation. MCI moved for dismissal all of TCI's counterclaims as barred by the filed tariff doctrine. Initially, the district court found that the contractual relations between MCI and TCI was governed by MCI Tariff FCC No. 1, the same tariff which governs the contractual relations between ATI and MCI in the instant case. However, the district court found that this conclusion did not end its analysis of TCI's counterclaims, explaining:

> By its own terms, the MCI Tariff does not limit MCI's liability if judicial or administrative proceedings establish that MCI committed "willful misconduct." MCI Tariff, section B, para. 492, 9th Revised page 10. Viewing the pleadings in the light most favorable to TCI, as required by Fed.R.Civ.P. 12(b)(6) and 8(1), this Court understand TCI's Count I to allege that MCI's actions constituted "willful misconduct" and therefore violated the MCI Tariff, an alleged breach of contract. Count II similarly claims that the MCI

Tariff allows liability for MCI's alleged "willful misconduct," which allegedly support tort liability for intentional misrepresentations.

Does the Communications Act of 1934 prohibit recovery by TCI under any theory of liability, regardless of the terms of the MCI Tariff? Certainly, the tariff as a whole, and not merely the rates contained therein, is paramount. Otherwise, any provisions of the MCI Tariff would be meaningless. The entire MCI Tariff must be controlling, including the "willful misconduct" clause. *See Stand Buys, Ltd. v. Michigan Bel Tel. Co.*, 646 F.Supp 36, 37-38 (E.D.Mich. 1986) (Applying "willful misconduct" clause of carrier's tariff, but concluding that no evidence of willful misconduct existed at summary judgment stage); *Pilot Indus. v. Southern Bell Tel. & Tel. Co.*, 495 F.Supp. 356, 361-62 (D.S.C. 1979) (applying clause in filed tariff allowing liability for willful or wanton conduct, but finding no evidence of willfulness or wantonness at summary judgment stage); *Sommer v. Mountain States Tel. & Tel. Co.*, 21 Ariz.App. 385, 387-88, 519 P.2d 874, 876-77 (1974) (holding that clause in filed tariff permitted recovery for willful acts).

The MCI Tariff itself does not clearly preclude a contract or tort claims against MCI based on its alleged "willful misconduct." MCI has not attempted, moreover, to characterize the alleged representations of its salespeople as being outside the scope of their agency relationship. Recovery by TCI, therefore, is not precluded.

772 F.Supp. at 67-68 (emphasis added).

Like the courts in *Fax Telecommunicaciones* and *TCI*, this Court finds that the liability language contained in MCI's tariff does not preclude a tort claim against MCI based on its alleged willful misconduct. To the contrary, it expressly states that MCI's liability is not limited if it is determined in a judicial or administrative proceeding that MCI engaged in willful misconduct. However, it does bar ATI's claim for negligent misrepresentation, inasmuch as that claim does not involve willful misconduct by MCI.

Accordingly, the Court finds that MCI's argument that ATI's state law claims are barred by the filed tariff doctrine fails except as to ATI's claim of negligent misrepresentation and breach of contract. As to those two claims, MCI is entitled to summary judgment.

V. ATI's PROMISSORY ESTOPPEL CLAIM

MCI moves for summary judgment on ATI's claim for promissory estoppel on the ground that promissory estoppel is not available where a contract exists between the parties governing the subject matter of the promise. ATI contends that it is entitled to maintain its promissory estoppel claim because the contract it had with MCI contains no provisions relating to or governing the promises and representations made by MCI. For the reasons set out below, the Court finds that the promissory estoppel claim is not available to ATI.

Promissory estoppel is normally a defensive theory. However, it may be asserted by a plaintiff as an affirmative ground for relief. *El Paso Healthcare System, Ltd. v.*

Piping Rock Corp., 939 S.W.2d 695, 698 (Tex.App. – El Paso, 1997, no writ) (citing *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 707 (Tex.App. – Houston [1st Dist.] 1988, writ denied)); *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663 (Tex.App – Houston [1st Dist.]. 1996); *In re Texas Mortgage Services Corp.*, 761 F.2d 1068 (5th Cir. 1985). Under the doctrine of promissory estoppel, a promise may be binding if the promisor should reasonably expect that the promise will induce action or forbearance, the promise does in fact induce such action or forbearance, and the enforcement of the promise is necessary to avoid injustice. *Piping* Rock, 939 S.W.2d at 699 (citing *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1972); *Adams*, 754 S.W.2d at 707)). However, if a valid contract between the parties covers the alleged promise, promissory estoppel is inapplicable to that promise. Instead, the wronged party must seek damages under the contract, 939 S.W.2d at 699 (citing *Guaranty Bank v. Lone Star Life Ins. Co.*, 658 S.W.2d 431, 434 (Tex.Civ.App. – Dallas 1978, *writ ref'd n.r.e.*)).

Under Texas law, the basic requirements of a promissory estoppel claim are: "(1) a promise, (2) forseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." *Clardy Mfg. Co. v Marine Midland Business Loans*, 88 F.3d 347, 360 (5th Cir. 1996) (quoting *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)). Texas courts have also established a fourth and separate requirement of a "definite finding that *injustice can be avoided only by the enforcement of the promise." Clardy*, 88 F.3d at 360 (quoting *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 137 (Tex.App. – Beaumont 1993, writ denied) (emphasis in original)). In

addition, the courts have emphasized that "estoppel requires a *reasonable* or *justified* reliance on the conduct or statement of the person sought to be estopped by the person seeking the benefits of the doctrine." *Clardy*, 88 F.3d at 360 (quoting *Traco Inc. v. Arrow Glass Co.*, 814 S.W.2d 186, 190 (Tex.App. – San Antonio 1991, writ denied) (emphasis in original an internal quotation marks omitted)), *cert. denied*, ___ U.S. ___, 117 S.Ct. 740, 136 L.Ed.2d 679.

ATI makes the following allegations with regard to its promissory estoppel claim:

> 11. During or before 1992, TELMEX entered into an agreement with MCI INTERNATIONAL INC. to provide international 800 (I-800) service from Mexico to the United States. MCI INTERNATIONAL, INC. provided this service to MCI TELECOMMUNICATIONS CORP. during and since 1992. MCI TELECOMMUNICATIONS CORP. advertised and offered for sale to its customers I-800 service for calls originating from Mexico, based on the services provided by TELMEX.
>
> 12. During 1993 and 1994, ATI contracted with MCI TELECOMMUNICATIONS CORP. for I-800 services from Mexico for itself and as agent for various customers. In addition to the I-800 service from Mexico, ATI offered a switching service carried out in Texas and elsewhere in the United States whereby customers could complete calls to a variety of U.S. 800 and other telephone numbers from Mexico. MCI represented to ATI that it had the authority and capacity to contract for telephone services through TELMEX between Mexico and the

United States; that the proposed activity by ATI was within the terms of the tariff and in all respects a legal reuse of the services provided; that services would continue under the same legal terms in the future; that the rights and obligations of the parties under contract were enforceable and that MCI would provide the same services in the future with special accommodations to ATI as its business increased. These and other promises were representations induced ATI to enter into an agreement with MCI and were a producing cause of damages to ATI.

. . . .

20. The Defendant, MCI, further made representations in the course of its business or in a transaction in which it had a pecuniary interest and MCI supplied false information for the guidance of the Plaintiff. MCI failed to exercise reasonable care or competence in obtaining or communicating the information to the Plaintiff. The Plaintiff suffered a pecuniary loss by justifiably relying on the representations made by MCI and the Plaintiff hereby sues for all damages sustained as a result of the negligent misrepresentations made by MCI.

21. It was reasonably foreseeable that the plaintiff would rely on the promises made. Further, plaintiffs substantially relied on the promises made by the MCI defendants to its detriment. Injustice could be avoided only be (sic) enforcement of these promises. Plaintiff therefore affirmatively asserts the common law doctrine of promissory estoppel and hereby asks the jury to award it all damages sustained as a result of the conduct of the MCI defendants.

See Plaintiff's First Amended Complaint, pages 3 and 5.[12]

As the Court understands it, ATI is alleging that MCI made three misrepresentations to it during the negotiation of the contract. First, MCI allegedly represented that it had authority to sale the I-800 service to ATI. Second, MCI represented that ATI's resell of the I-800 service was within the terms of the MCI Tariff. Finally, MCI represented that ATI's proposed resell of the I-800 was legal under Mexican law.

With regard to ATI's allegation that MCI told it that its resell of the I-800 service was permissible under Mexican law, the Court has already determined in passing on ATI's Motion for Partial Summary Judgment that ATI's provision of the I-800 service to Mexican residents without first obtaining a concession or permit from the SCT was illegal under Mexican law. Furthermore, ATI has cited the Court to no case, nor has the Court found any case in which a party asserted, much less prevailed on, a claim of promissory estoppel on the ground that the other party misquoted or misrepresented the law. It seems too obvious to state that ATI could not reasonably or justifiably rely on MCI's representation as to what the Mexican law was with respect to ATI's resell of the I-800 service ATI could and should have ascertained for itself whether or not its resell of the I-800 service was legal under Mexican law. Therefore, MCI is entitled to summary judgment on this particular claim of promissory estoppel.

As for ATI's claim that MCI represented that it had the authority and capacity to contract with ATI to provide

---

[12] Docket Entry No. 51.

the I-800 service, the Court finds that ATI has not come forward with any evidence that MCI did not have authority to enter into the contract with ATI for the provision of the I-800 service to ATI. In fact, ATI has consistently maintained the position that its purchase of the I-800 service from ATI for resale to its customers was legal under Mexican law and that Telmex had no legal right to disconnect the service. Implicit in this assertion is that MCI has the authority to contract with ATI for the I-800 service.

The final misrepresentation allegedly made by MCI was that its resell of the I-800 service to ATI was within the terms of the MCI Tariff. As with ATI's earlier claim that MCI misrepresented that ATI's resell of the I-800 service was legal under Mexican law, the Court finds that ATI cannot show that its reliance on this alleged misrepresentation by ATI was reasonable or justified. The MCI Tariff was filed and open for inspection by ATI to determine for itself whether or not MCI was permitted to resell the I-800 service under the MCI Tariff. This being so, ATI is precluded from showing that it was entitled to rely on MCI's word as to its right to resell the I-800 service to ATI.

VI. ATI's TORTIOUS INTERFERENCE CLAIMS

MCI next argues that ATI's tortious interference claims are barred because they are in essence claims for breach of contract. According to MCI, ATI is seeking to recover damages for MCI's breach of its duty to provide the I-800 service as promised in its contract with ATI. Although this may state a claim for breach of contract,

MCI argues, it does not provide the basis for a claim sounding in tort. ATI responds that its tortious interference claims against MCI are not for conduct related to the subject matter of the contract but are instead for MCI's interference with its arrangements and contracts with its I-800 international customers and its conspiring with Telmex and the other defendants to prevent ATI from subsequently obtaining I-800 service from AT&T. As explained below, ATI's argument fails as to its claim that MCI interfered with its contractual relationship with its I-800 international customers.

In *Southwest Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991), DeLanney brought suit against Southwestern Bell alleging negligence and violation of the Texas Deceptive Trade Practices – Consumer Protection Act ("DTPA") for its failure to publish his advertisement in the Yellow Pages. The trial court granted Bell's motion for a directed verdict as to the DTPA claim, but denied it as to negligence. The jury found that Bell was negligent in omitting DeLanney's advertisement from the Yellow Pages and the trial court rendered judgment for DeLanney. Bell appealed.

On appeal, the court of appeals, with one justice concurring and one justice dissenting, affirmed. The majority of the court held that Bell's cancellation of DeLanney's advertisement was correctly submitted as a negligence claim. The dissenting justice argued that because DeLanney sought damages for breach of a duty created under the contract, rather than a duty imposed by law, the claim sounded only in contract.

The Texas Supreme court reversed and remanded, explaining:

> If the defendant's conduct . . . would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct . . . would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract.
>
> In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff's loss. When the only loss or damages is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract. *See* PROSSER AND KEETON AT 656; 1 J. EDGAR, JR. & J. SALES, TEXAS TORTS AND REMEDIES § 1.03[4][b] at 1-36 (1990). We applied this analysis in *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986), where we wrote:
>
> > The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone.
>
> Bell's duty to publish DeLanney's advertisement arose solely from the contract. DeLanney's damages, lost profits, were only for the economic loss caused by Bell's failure to perform. Although DeLanney pleaded his action as one in negligence, he clearly sought to recover the benefit of his bargain with Bell. We hold that Bell's

> failure to publish the advertisement was not a tort. Under our analysis in *Reed*, DeLanney's claim was solely in contract.

809 S.W.2d at 494-495. Finding that DeLanney had waived any claim for breach of contract by failing to submit any contract issues to the jury, the Supreme Court reversed the judgment of the court of appeals and rendered a take nothing judgment against DeLanney.

Following the analysis used in *DeLanney*, the Court concludes that the only claim ATI could bring against MCI for not providing the I-800 service for which ATI contracted is one for breach of contract. The duty to provide the service arose from the contract and the injury for which ATI seeks damages is the economic loss it sustained as a result of MCI's failure to provide the I-800 service as provided by the contract. However, as this Court has determined prior hereto, ATI may not maintain this claim due to the cited liability provisions contained in the MCI Tariff. To the extent that ATI attempts to assert a separate claim for tortious interference based on MCI's failure to honor its contractual obligation to provide the I-800 service, the Court finds that it may not do so.[13]

However, the fact that ATI may not pursue a claim for tortious interference based on MCI's failure to provide the I-800 service as called for by the contract with ATI does not mean that ATI is barred from asserting a

---

[13] In light of its determination that the only claim ATI may assert against MCI for failing to provide the I-800 service is one for breach of contract, the Court finds no need to address MCI's additional arguments as to why it is entitled to summary judgment with respect to ATI's tortuous interference claim.

tortious interference claim based on MCI allegedly conspiring with Telmex and the SBC defendants to block ATI from contracting with AT&T for the I-800 service. Clearly, any actions taken by MCI to interfere with ATI's efforts to contract with AT&T would breach duties independent of those imposed by its contract with ATI. Likewise, the damages which ATI might recover would be for the economic loss it suffered from not being able to obtain the I-800 service from AT&T. Therefore, to the extent that it is based on MCI allegedly preventing it from contracting with AT&T for the I-800 service, ATI may bring a claim for tortious interference.

However, ATI's success in [sic] short-lived. In order to prevail on this claim, ATI would have to show that it had the required concession from the SCT to provide the I-800 service to Mexican customers. The evidence of record, however, is that ATI never sought or obtained a concession from the SCT. Consequently, MCI is entitled to summary judgment on this tortious interference claim as well.

VII. ATI's ANTITRUST CLAIMS

MCI moves for summary judgment as to ATI's claim for violation of the Texas Antitrust Act as being preempted by federal law. Specifically, MCI argues that ATI's allegation that MCI conspired with Telmex and the other defendants to restrain trade involving interstate and foreign commerce must be resolved under federal antitrust law. Therefore, because all the facts giving rise to ATI's claim occurred in Mexico, ATI must pursue its claim under federal law. ATI responds that the Fifth Circuit rejected this preemption argument in *Pounds Photographic*

Labs v. Noritsu America Corp., 818 F.2d 1219 (5th Cir. 1987) (holding that pre- 1983 Texas antitrust statutes were not preempted by the Sherman Act; Texas antitrust statutes are supplementary to the federal regulatory scheme). Moreover, ATI contends, not all the act in furtherance of the conspiracy occurred in Mexico, some of the acts took place in the United States. Although acknowledging that federal antitrust laws do not completely preempt state laws, MCI replies that as a general rule, federal antitrust laws govern interstate commerce and state antitrust laws apply to intrastate commerce. Therefore, because all the activities of which ATI complains occurred outside the United States, the Texas Antitrust Act does not apply. Moreover, because federal antitrust laws do not reach conduct involving foreign trade or commerce, such conduct is also exempt from the Texas Antitrust Act by virtue of § 15.05(g) of the Texas Business & Commerce Code. The Court will address this last argument first.

Section 1 of the Sherman Act prohibits conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. §1. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization "of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. §2. Although the Sherman Act applies to trade and commerce with foreign nations, it applies to foreign anti-trust conduct only to the extent that said conduct produces "some substantial effect in the United States." *Hartford Fire Insurance Co. v. California*, 509 U.S 764, 796, 113 S.Ct. 2891, 2909, 125 L.Ed.2d 612 (1993); *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997). Specifically, pursuant to §6a of the Sherman Act, anti-trust

conduct involving United States export commerce with foreign nations is actionable only if said conduct has a "direct, substantial, and reasonably foreseeable" effect on one of the following: (1) on United States domestic commerce; (2) on United States import commerce; or (3) on export commerce only to the extent that such conduct injures export business in the United States. 15 U.S.C. §6a. The limitation of §6a applies even where the antitrust conduct originates in the Unites States or involves American-owned entities operating abroad. *Eurim-Pharm GmbH v. Pfizer, Inc.*, 539 F.Supp. 1102, 1106 (S.D.N.Y. 1984).

Earlier in this case the Court dismissed ATI's claims against Telmex, finding that it lacked personal jurisdiction over Telmex. In the course of addressing the jurisdictional issue, the Court was required to determine whether ATI had stated a claim against Telmex for violation of the Sherman Act and found that it had not, observing:

> [A]ll the activities of Telmex of which complains occurred outside the United States. Moreover, the market from which ATI alleges to have been excluded by Telmex is the I-800 service market in Mexico, outside the United States. Neither the fact that ATI is an American corporation or that SBC and MCI are American corporations provide the requisite nexus with American trade that would bring the alleged illegal activity within the purview of the Sherman Act. *See Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp. 47, 49 (S.D.N.Y. 1983) (Sherman Act claim of plaintiff, a Cyprus corporation, failed to state cause of action, where activities complained of all occurred outside United States, market from which plaintiff was supposedly

excluded was outside the United States, and plaintiff made no suggestion of a "relevant market" in United States nor mentioned any American competitors; fact that principal shareholder of plaintiff was United States citizen and one of the defendants was a corporation organized within States did not provide requisite nexus with American trade that would bring alleged illegal activity within purview of Sherman Act). *See also Optimum v. Legent Corporation*, 926 F.Supp. 530 (W.D.Pa. 1996) (holding that foreign corporation which marketed and distributed computer software products of American corporation in Argentina failed to establish that termination of its marketing contract by another foreign corporation resulted in anticompetitive effect on United States' domestic commerce, and thus district court lacked subject matter jurisdiction over corporate distributor's claim that termination of marketing contract violated Sherman Act; allegation that income flowed between corporations was insufficient to establish requisite domestic effect and distributor, a foreign corporation, could not maintain action under Sherman Act based merely upon injury to United States exporters attempting to enter Argentine computer software market).

As observed by the Court of Appeals for the Tenth Circuit:

> The principal purposes of the antitrust laws are protection of American consumers and American export and investment opportunities. If American interests are at stake we may impose liability for conduct outside our borders that has consequences within our borders. *See Alcoa*, 148 F.2d at

> 443. When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction. We believe that the analysis set forth in *Timberland Lumber Co. v. Bank of America*, 549 F.2d at 613-15, contains the proper elements for consideration. To support jurisdiction of American court, plaintiff must first show that the challenged activity had an actual effect on United States commerce. Then we must decide if "the interest of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id.* at 613.

Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869 (10th Cir. 1981). In short, the antitrust laws of the United States do not regulate the competitive conditions of other nations' economies. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *See also Industrial Inv. Develop. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883 (5th Cir. 1982) (district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law or international law).

In view of the fact that the conduct of Telmex all occurred in Mexico, that the market from ATI claims to have been excluded is the I-800 service in Mexico, and that the resultant economic consequences are felt predominantly

> by Mexican consumers, the Court finds it does not have subject matter jurisdiction of ATI's antitrust claims against Telmex.

See Court's Order of June 20, 1997, pages 8-10.[14]

Even though they were made in the context of deciding if Telmex was subject to the personal jurisdiction of this Court, the Court finds that these findings are also determinative of whether or not ATI has a claim against MCI under the Sherman Act. As the Court noted in the above-quoted excerpt from its previous order, the market from which ATI claims to have been excluded is the I-800 service in Mexico. Likewise, the resultant economic consequences of Telmex and the other defendants terminating ATI's I-800 service was felt predominantly in Mexico by Mexican consumers. Although ATI claims that it has evidence that the actions MCI took to provide Telmex with the information it needed to terminate ATI's I-800 service occurred in the United States, the Court finds that this is not enough to maintain a claim under the Sherman Act against MCI. Likewise, the fact that MCI is an American corporation does not provide a sufficient nexus with American trade to bring the alleged illegal action of MCI within the purview of the Sherman Act. *See Power East Limited v. Transamerican Delaval Inc.*, 558 F.Supp at 49. Furthermore, ATI's assertion that the income generated by its I-800 service flowed into the United States is insufficient to establish the requisite domestic effect. *Optimum, S.A.*, 926 F.Supp. at 533 (assertion by plaintiff that the income in issue flowed and would continue to flow between corporations located in the United States and

---

[14] Docket Entry No. 74.

corporations located in Argentina deemed insufficient to establish the requisite domestic effect required by §6(a).

Accordingly, the Court finds that ATI cannot maintain its federal antitrust claims against MCI. Consequently, because the antitrust laws of Texas do not reach activities exempt from the operation of the federal antitrust laws,[15] ATI's claims against MCI for violation of the Texas antitrust laws likewise fall to MCI's summary judgment motion.

CONCLUSION

Based on the above findings, it is hereby ORDERED that MCI Telecommunications Corporation and MCI International, Inc.'s Motion for Summary Judgment be, and the same is hereby, GRANTED.

SIGNED this the 5th day of August, 1998.

/s/ D.W. Suttle
D.W. SUTTLE
Senior United States District Judge

---

[15] Section 15.05 of the Texas Free Enterprise and Antitrust Act provides in pertinent part that "[n]othing in this section shall be construed to prohibit activities that are exempt from the operation of the federal antitrust laws. 15 U.S.C. Sections 1 et seq." Tex.Bus.&Com.CodeAnn. § 15.05(g).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ACCESS TELECOM, INC., Plaintiff, V. MCI TELECOMMUNICATIONS CORP., MCI INTERNATIONAL, INC., SBC COMMUNICATIONS, INC., SBC INTERNATIONAL, INC., and SBC INTERNATIONAL LATIN AMERICA, Defendants.	§	CIVIL NO. SA-96-CA-1064

JUDGMENT

(Filed Aug. 5, 1998)

In its hereby ORDERED, ADJUDGED and DECREED that Plaintiff, Access Telecom, Inc., take nothing on its claims against the Defendants, MCI Telecommunications Corp., MCI International, Inc., SBC Communications, Inc., SBC International, Inc., and SBC International Latin America, Inc., and that judgment be entered in favor of the Defendants MCI Telecommunications Corp., MCI International, Inc., SBC Communications, Inc., SBC International, Inc., and SBC International Latin America, Inc. Each party shall bear its own attorney's fees and costs.

SIGNED this the 5th day of August, 1998.

/s/ D.W. Suttle
D.W.SUTTLE
Senior United States District
Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50881

ACCESS TELECOM, INC

Plaintiff - Appellant

v.

MCI TELECOMMUNICATIONS CORPORATION; MCI INTERNATIONAL, INC; SBC COMMUNICATIONS, INC; SBC INTERNATIONAL, INC; SBC INTERNATIONAL LATIN AMERICA; TELEFONOS DE MEXICO

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ON PETITIONS FOR REHEARING
AND REHEARING EN BANC

(Opinion 12/1/99, 5 Cir., ___, ___, F.3d ___)

(Filed Feb. 15, 2000)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc. (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Patrick S. Higginbotham
United States Circuit Judge

Judges Emilio M. Garza, Barksdale, and Jolly did not participate in the consideration of the petition for rehearing en banc.